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WATER ON PREMISES AS A DANGEROUS ELEMENT RENDERING OWNER LIABLE ANY INJURY CAUSED BY IT.

The English case of Ryland v. Fletcher laid down the rule that where a man collected a large reservoir of water on his land in close proximity to the property of his neighbor, he is liable for any injury resulting from it independent of his own negligence, on the ground that water so collected is a dangerous element. There has been considerable disapproval in this country to the general rule thus announced; but few courts have failed to be impressed with the justice and logic of the English court's decision, and their disapproval is generally expressed not in overruling that decision, but in making exceptions to the rule there announced. This is also the action of the Missouri supreme court in the recent case of McCord Rubber Company v. St. Joseph Water Company, 81 S. W. Rep. 189, where the court held that, where water was brought onto premises occupied by defendant, by ordinary service pipes, defendant was not liable to the occupant of adjoining premises for injuries caused by a break in the pipe, in the absence of negligence, on the theory that defendant, having brought the water on his premises, was bound, at his peril, to prevent its escape, and was responsible for any injury caused thereby. The court justifies the exception to the general rule by the following argument:

"The plaintiff contends, however, that the defendants are liable regardless of whether they were guilty of any negligence directly causing the accident. This contention rests on the theory that one who brings into his premises anything that is liable to escape and liable to inflict injury on his neighbors, if it should escape, brings it there at his peril, and is responsible for any injury that it may cause. That contention rests for its authority on the decision in Ryland v. Fletcher, L. R. 3 H. L. 330. In the briefs of the learned counsel for respondents reference is made to a large number of authorities going to show that the doctrine of Ryland v. Fletcher has not been approved generally in America and that it has been modified in England. Among the authorities so referred to are Griffin v. Lewis, 17 Mo. App. 605; Murphy v. Gillum, 73 Mo. App. 487; Cooley on Torts, 570; Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372. But in the facts of the case at bar, it is distinguished from Ryland v. Fletcher. In that case the defendants were owners of a well, and for their own use they caused to be constructed, on land which they controlled, a reservoir in which was accumulated a large volume of water. Beneath the surface of the land there had formerly been a mine in which were shafts, some vertical and others horizontal. These shafts had been filled up with earth and rubbish. The defendants knew nothing of their existence. The weight of the water in the reservoir bore so heavily on the ground that it yielded to the pressure and the water made its way down the shafts and flooded the plaintiff's mines. It was held that the defendants were liable. The court said: "The defendants * * * might lawfully have used the close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. * * * On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water, either above or below ground, in quantities and in a manner not the result of any work or operation on or under the land, and if in consequence of their doing so, or in consequence of any imperfection in the mode of doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril." There is a wide difference between a great volume of water collected in a reservoir in dangerous prox-

imity to the premises of another, and water brought into a house through pipes, in the manner usual in all cities, for the ordinary use of the occupants of the house. Whilst water so brought into a house cannot literally be said to have come in in the course of what might be called, in the language above quoted of the lord chancellor, "natural user" of the premises, yet it is brought in by the method universally in use in cities, and is not to be treated as an unnatural gathering of a dangerous agent. The law applicable to the caging of ferocious animals is not applicable to water brought into a house by pipes in the usual manner.

NOTES OF IMPORTANT DECISIONS.

EVIDENCE—HYPOTHETICAL QUESTIONS PROPOUNDED TO EXPERT BASED ON THE ACTUAL FACTS OF THE CASE.—Sometimes the attorney for plaintiff in a case for personal injury so frames a hypothetical question put to his experts as to state only the facts as he alleges them in his petition or as he has proved them by his evidence, which invariably calls forth an objection from the defendant's attorney on the ground that the question simply calls upon the witness to give an opinion as to whether plaintiff was entitled to recover and is not predicated on all the facts. The recent case of Wood v. Metropolitan Street Railway Company, 81 S. W. Rep. 152, contains an interesting and exhaustive discussion of this important question. The court said:

"The remaining proposition is that the hypothetical question was improper. That question is in the words following: 'Q. Doctor, you stated in the first part of your examination that when you examined this plaintiff in your office last fall, previous to the other trial, that you found that she had neurasthenia. Now, I will ask you this hypothetical question: Take it for granted that previous to October 6, 1897, Mrs. Wood, the plaintiff, was in good health; that something like a year before that she had malarial fever, from which she had entirely recovered; that on the 6th day of October, she was standing on the platform in connection with some thirty or fifty other persons, and the platform went down with her and the other persons to a distance of something over 16 feet, or about 16 feet or more; that she fell in the pile there with the other persons; that by this fall she was rendered unconscious; that she was taken out of this place to which she fell, which was the ground, and a muddy, soft place below, falling along with some timbers which were fallen along with the people, and a portion of the platform falling diagonally along with them, or, rather, a portion of the platform falling along with them, and, as I said, she was rendered unconscious by this fall; that she was taken out; that she does not know herself to be hurt, and regained consciousness some minutes afterwards, when she was upon the depot platform above; that she received an injury in some way to her hip, which gave her pain then and for some time afterwards, and that in this fall her head received an injury which has pained her, and in her head she had pain since, and has had it up to the time you made this examination, the pain being located in the back part of her head; that at the time of the injury she had quite a number of rubber hairpins in her hair, which was done up in the usual way, and that these hairpins were all broken; found to be broken immediately after the injury—I will get you to state whether or not the injury that I have described was, in your opinion,—the injury and the fall was, in your opinion, in her case—sufficient to produce the disease of neurasthenia, which you found her to be suffering with upon your examination at Kansas City last fall?' To this question it was objected that it was simply calling upon the witness to give an opinion as to whether plaintiff was entitled to recover, and was not predicated on all the facts, and the question was one to be determined by the jury. There can be no doubt that it is not allowable to permit an expert witness to give his opinion upon matters upon which men of common information are capable of forming a judgment. Many of the cases cited by appellant are clearly of this character, and do not reach the point now under consideration. As said by Macfarlane, J., in Benjamin v. Ry. Co., 133 Mo. 288, 34 S. W. Rep. 593: 'An exception is made to the general rule forbidding witnesses to give their opinions, and persons who, by experience, observation, or knowledge, are peculiarly qualified to draw conclusions from such facts, are, for the purpose of aiding the jury, permitted to give their opinions. The exception is allowed from necessity. An expert witness in a manner discharges the functions of a juror, and his evidence should never be admitted unless it is clear that the jurors themselves are not capable, from want of experience or knowledge of the subject, to draw correct conclusions from the facts proved.' This is a correct statement of the general doctrine. Now, it must be conceded that the disease of neurasthenia, or nervous prostration or nervous exhaustion, though one of the most serious character and causing great suffering, is little understood by the average person, either in its symptoms, or the causes which produce it. Being an affection of the nervous system, it may be said to lie peculiarly within the province of a medical expert to determine its existence and ascertain its cause. Certainly it cannot be said that the average juror is as capable of determining from certain symptoms the existence of such a disease and its cause as a medical man who has made it a study. While the experience and learning of the physician might readily detect it, the ordi-

nary man would know nothing of it. In a word, whether a man or woman is afflicted with neurasthenia, and what produced it, is peculiarly a matter of scientific or technical knowledge. Hence in this case no objection was taken, and properly not, to the testimony of Dr. Kuhn as to the nature of this disease, and its general characteristics, or the usual causes producing it. Manifestly, no one but a physician, and we might add, one who has made a study of nervous troubles, is competent to speak intelligently on the subject. It was not a matter within the common knowledge of ordinary men. The objection, narrowed down, is to the action of the court in permitting him, in view of the facts detailed in the hypothetical case, to give his opinion as to what caused the nervous prostration with which he found Mrs. Wood to be suffering. He was competent, after his examination of her, to say that was her disease. Made acquainted, then, as he was, by the facts stated in the hypothetical case, was he, or was he not, competent to express an opinion as to the cause of said disease? The question is by no means a new one. In Donnelly v. St. Paul City Ry. Co., 70 Minn. 278, 73 N. W. Rep. 157, the action was for damages for personal injuries. The main assignment of error related to the action of the trial court in permitting a hypothetical question propounded to a medical expert, calling for his opinion as to the cause of plaintiff's condition, based upon the evidence as to the manner in which she received her injury, the kind of injury afflicted, her subsequent condition, and her bodily condition. It will be observed that it furnishes a legal parallel to the question now before us. The court said the objection was that the opinion sought from the expert called for the cause of the plaintiff's condition, and was not the subject of expert testimony; being the very question the jury were to pass upon. The same here. The court responded to that contention as follows: 'It is laid down in the books that a question to an expert witness should not be framed so as to invade the province of the jury, but the line of cleavage between what does and what does not invade the province of the jury is not capable of definite location by any exact rule applicable to all cases, without regard to the subject of inquiry. The mere fact that the opinion called for covers the very issue the jury will have to pass upon is not conclusive that it is not the proper subject of expert or opinion evidence. For example, sanity or insanity is the subject of expert testimony, although that may be the sole issue to be determined by the jury. Neither do we appreciate the fine distinction sometimes sought to be drawn between asking the expert whether, in his opinion, certain causes might produce certain results, and asking him whether, in his opinion, they did produce certain results. It is well settled that the opinions of medical experts as to the cause of death are admissible; such opinions being founded either upon the personal knowledge of the facts of the case, or upon a statement of the nature of the injury or symptoms and nature of the disease as testified to by others. Rogers, Expert Testimony, § 49, and cases cited. There can be no difference in principle between this and an opinion as to the cause of physical ailments which have not resulted in death. This court has held that in answering a hypothetical question embodying a person's assumed symptoms and conditions, as testified to by others, a medical expert may give his opinion as to the probability of recovery. Peterson v. Chicago, 38 Minn. 511, 39 N. W. Rep. 485. Also, a physician who has heard the testimony as to the manner in which the plaintiff was injured, the kind of injury inflicted, and his present bodily condition, may give an opinion, based on that evidence, as to the cause of the plaintiff's condition. Cooper v. St. Paul, 54 Minn. 379, 56 N. W. Rep. 42.' This case is directly in point. The learned court then goes on to comment on Briggs v. Minneapolis, 52 Minn. 36, 53 N. W. Rep. 1019, and concludes by saying: 'The writer of the opinion in that case probably used language which is too broad, as a general proposition of law, unless qualified or limited.' Counsel for defendant in this case relies upon the Briggs case as an authority for their contention, but it appears that the court which rendered it has since disapproved it.

Very apposite to this discussion is the opinion of the Court of Appeals of New York in McClain v. R. R. Co., 116 N. Y. 468, 22 N. E. Rep. 1065: "There was no error in the reception of the evidence referred to in the present case. It was given as the judgment of the witness that the injury was the cause of the condition of the plaintiff, and that certain consequences would follow, in relation to his physical health and condition, as the result of the injuries, as indicated by such condition. And the same may be said of the exception taken to the reception of the answer of the doctor to the hypothetical question upon the state of facts assumed by the inquiry. It was competent for the witness to state that, in in his judgment, the tremor and the impairment of the nervous system with which the plaintiff was afflicted was due to the injury. The facts upon which the question was based practically excluded all causes up to the time of the accident. And therefore the evidence called for was not speculative. It was offered to show, not merely that the injury might produce the condition from which such result was likely to follow, but that in view of such facts it did cause such condition.'

Without quoting at length from the following cases, they announce the same rule, and hold that it is competent for an expert medical man to give his own opinion, in view of the statement of facts, that the injury was the cause of the disease or condition found in the injured person: Stouter v. Manhattan Ry. Co., 127 N. Y. 661, 27 N. E. Rep. 805; Filer v. Ry. Co., 49 N. Y. 42;

Flaherty v. Powers, 167 Mass. 61, 44 N. E. Rep. 1074; Turner v. Newburgh, 109 N. Y. 308, 16 N. E. Rep. 344, 4 Am. St. Rep. 453; City of Decatur v. Fisher, 63 Ill. 241; Com. v. Mullins, 2 Allen, 295; Tracy v. Street R. R., 63 N. Y. Supp. 242; Stout v. Ins. Co., 130 Cal. 471, 62 Pac. Rep. 732; United Railways v. Seymour, 92 Md. 425, 48 Atl. Rep. 850; St. Louis & S. W. R. R. v. Laws (Tex. Civ. App.), 61 S. W. Rep. 498. In Missouri the rule is well established that a medical expert may give his opinion as to the cause of a diseased condition, or that it will be permanent, or the cause of death, upon a hypothetical statement of the facts. And as to the proposition that his opinion may go to the very issue on trial, it was ruled in State v. Wright, 134 Mo. 404, 35 S. W. Rep. 1145, that a medical expert may give his opinion as to the sanity or insanity of the defendant, having for a basis the hypothetical case, together with what he had learned from an examination of the defendant, though this is the sole issue to be decided by the jury. State v. Welsor, 117 Mo. 580, 581, 21 S. W. Rep. 443; State v. Minton, 116 Mo. 605, 22 S. W. Rep. 808. Indeed, nothing is better settled in the criminal practice than that a medical witness may describe the wounds which he observed upon a dead person, and give his opinion whether one or more of them produced the death, or were necessarily mortal. The cases are too numerous to cite. And it is the universal rule in this country that a medical expert may give his opinion as to the cause of death, notwithstanding that is one of the issues and sometimes the only issue in the case. Smiley v. Ry. Co., 160 Mo. 639, 61 S. W. Rep. 667; State v. Chiles, 44 S. Car. 338, 22 S. E. Rep. 339; Powell v. State, 13 Tex. App. 244; Mitchell v. State, 58 Ala. 417; Simon v. State, 108 Ala. 27, 18 So. Rep. 731; Newton v. State, 21 Fla. 102; State v. Tippet, 94 Iowa, 649, 63 N. W. Rep. 445; State v. Smith, 32 Me. 370, 54 Am. Dec. 578.

The industry of counsel has collated a large number of decisions in this state in which were considered questions as to matters within the ordinary experience of life, questions which the average juryman in possession of the facts could determine equally as well as an expert, and they were excluded on this ground—such, for instance, as Graney v. R. R., 157 Mo. 682, 57 S. W. Rep. 276, 50 L. R. A. 153—whether it was possible for a boy to fall in a certain manner without striking the cars; or Langston v. Ry. Co., 147 Mo. 465, 48 S. W. Rep. 835, in which it was proposed to ask the opinion of a witness as to the competency of a servant; or Eubank v. Edina, 88 Mo. 650—whether a sidewalk was in a reasonably safe condition. An examination of the whole list will disclose that they differ wholly from a case like the one under consideration, wherein the disease and its causes relate to a question of technical science or knowledge, of which an expert only can speak intelligently, and such peculiarity is a question as to the existence of a nervous disease, like neurasthenia, and its causes. The question propounded falls clearly within the exception noted in Benjamin v. Ry. Co., 133 Mo. 288, 34 S. W. Rep. 590, and there was no error in permitting it to be asked, or answered by the expert medical witness."

FIRE INSURANCE AS AN INDEMNITY CONTRACT.

The fire insurance business has grown so extensively in the past few years along with the development of commerce and the advance of civilization that it is now a very important factor in our jurisprudence.

The fire insurance contracts in 1895, in the United States were written by two hundred and eighty-eight (288) joint-stock companies and two hundred and sixty mutual companies. Twenty-six of the former were foreign, twenty of which were British, two Canadian, and four German. The amount of property interests insured was fifteen billion ($15,000,000,000) dollars in the joint-stock companies and seven hundred million ($700,000,000) dollars in the mutual companies.[1]

From the amount of money at stake and interests of property involved, it is very important that these money and property interests should be jealously guarded and well defined by the courts.

The doctrine of indemnity and of subrogation could hardly be stated better than that stated by Lord Justice Brett in the case of Castellain v. Preston,[2] where he says: "Every contract of marine or fire insurance is a contract of indemnity, and of indemnity only, the meaning of which is that the assured in case of a loss is to receive a full indemnity, but is never to receive more. * * * In order fully to carry out the fundamental principle we must carry the doctrine of subrogation so far as to say, that as between the underwriters and the insured, the underwriter is entitled to every right, whether fulfilled or unfulfilled, or in tort, enforced, or capable of being enforced, or to any other right, legal or equitable, which has accrued to the assured whereby the loss can be or has been diminished." If this interpretation is used, as between insured and insurer, and if no fraud or

[1] 2 New Am. Sup. Britannica Ency. 1278.

[2] Castellain v. Preston, L. R. 11 Q. B. D. 380; 29 Alb. L. J. 68.

laches cannot be imputed to either party, it will work out justice in all cases.

"The fundamental principle at the base of every contract of insurance affecting an interest in property is that of indemnity. This means that the object of the contract is, in the event of loss, to place the insured as nearly as possible within the terms and conditions of the policy, in the same situation as before the loss."[3]

And where the owner of property was insured by an insurance company who re-insured its risk with another company, it was held that the latter would have to pay the loss sustained by the re-insured and no more. Also, that as original contracts of fire insurance were indemnity contracts, it was more important that reinsurance contracts should be for indemnity only on the ground of public policy.[4]

It is the purpose of property insurance to pay the insured his loss to the extent of the policy as indemnity. Otherwise it would encourage gambling and deteriorate the value of property.[5] "Policies of insurance founded upon mere hope and expectation and without some interest, are said to be objectionable as a species of gaming. * * * Policies of fire insurance, without interest, are peculiarly and extremely hazardous by reason of the temptation they hold out to the commssion of arson by the party insured, which is necessarily attended with peril of the most deplorable kind to a whole neighborhood."[6]

"A contract for insurance against loss by fire is a contract of indemnity; and a contract to that end with a person who has no insurable interest in the property or cannot sustain any pecuniary loss by injury thereto, is a mere wager, contrary to public policy and void."[7]

Where a creditor had duly entered his judgment on the docket, it thereby created a lien on the realty of the debtor. The judgment creditor had an insurable interest therein. Where he insures his interest and the property is afterwards destroyed he can recover of the insurer if the judgment debtor hasn't property sufficient out of which the judgment can be satisfied.[8]

Another case holding that a creditor of the estate of a decedent whose personal property is insufficient to pay the creditor's claims, may insure to the extent of his interest if he would suffer a pecuniary loss by the destruction of the property.[9]

"The interest of an insurer against loss by fire may be that of an owner, or of a creditor, or of any other interest appreciable in money in the thing insured; but the nature of the interest must be specified."[10] And it is so on a bill to redeem, where the vendee in possession holds under a deed absolute on its face, but construed to be a mortgage, the defendant has an insurable interest in the property. It cannot be set up as a defense by any one except the insurers.[11]

In an action by the insured against the insurers, it was held where there was an executory contract of sale on the consideration that the insured assume certain partnership debts, that the vendee has an insurable interest. Even though the vendee has not performed his part of the contract.[12]

Where a vendor conveys land to another, who executes and delivers a deed of trust to a third person for the benefit of the grantor until the purchase money is paid, the vendor has an insurable interest in the property. It makes no difference whether he holds a legal title for his protection or the title is held in trust for him. In either case he has an insurable interest.[13]

Where a paid grantor passes title to the grantee, he no longer has an insurable interest in the property. And if there is a personal contract that if certain moneys come into the hands of the grantee he will account to the grantor, attaches no interest in the estate that is insurable.[14] "Marine and fire

[3] Elliott on Insurance, sec. 18; McDonald v. Black, 20 Ohio, 185.

[4] Eagle Insurance Co. v. LaFayette Ins. Co., 9 Ind. 443-446.

[5] 16 Am. & Eng. Ency. Law, 840.

[6] Warren v. Davenport Fire Ins. Co. (Iowa), 7 Am Rep. 160.

[7] Rohrbach v. Germania Ins. Co., 62 N. Y. 52; ravem yer v. The St. Mut. F. Ins. Co., 62 Pa. St. 340.

[8] Spare v. Home Mutual Ins. Co., 15 Fed. Rep. 707, (Oregon).

[9] Rohrbach v. Germania Ins. Co., *supra*; Herkimer v. Rice, 27 N. Y. 163.

[10] Civil Code of Lower Canada, sec. 2571.

[11] Russell v. Southord, 12 Howard, 139 at page. 157.

[12] Columbian Ins. Co. v. Lawrence, 2 Peters, 25, at page 47.

[13] Morrison's Adm'r v. Tenn. M. F. Ins., 18 Mo. 262, at page 266.

[14] Balow v. Teutonia Farmers Mut. Ins. Co., 77 Mich. 540; Porter's Law of Insurance, p. 65; Castel-

policies are contracts of indemnity, by which the claim of the insured is commensurate with the damages he sustained by the loss of, or injury to, the property insured. Such being the nature of the contract, it is clear that an absolute sale of the property insured, prior to the alleged disaster, is a good defense to any action on the policy, as the insured cannot justly claim indemnity for the loss of, or injury to, property in which he had no insurable interest at the time the loss or injury occurred."[15]

Where raw material is sold to a manufacturer with the understanding that the vendor is to have a lien on the same through all processes of manufacturing, until the purchase price is paid, the vendor has an insurable interest. He can recover the insurance, as against an attachment creditor of the vendee, though the insurance is taken out in the latter's name, provided, however, that there has been an agreement that the insurance is to be for the vendor's benefit.[16]

Property was sold for two thousand ($2,000) dollars. The grantor insured for grantee's benefit as was verbally agreed. The property was damaged by fire to the amount of seventeen hundred and forty ($1,740) dollars. Prior to the loss there had been thirteen hundred ($1,300) dollars of the purchase money paid. In an action by the vendee to recover of the insurance company the excess of the insurance money indemnifying the grantor, it was held that the vendee had an insurable interest and could recover the excess.[17]

The statement in the complaint was that the owner bought, paid for, and was using the property at the time of the disaster. No one except the vendor, who had a bare title of record, could contest its validity. The court held that the vendee was the sole and unconditional owner of the property insured and as such had an insurable interest.[18]

And so, where a vendee purchases property with the understanding that the vendor is to have possession and use of the same, and it is also understood between them that the vendee is to have the legal title, the latter has an insurable interest in the property.[19]

A corporation conveyed property to the grantee without fulfilling the requirements of the statute authorizing corporations to transfer lands. The acts of the agent who made the sale were ratified. The corporation, also, received the full purchase price. It was understood between the grantee and his agent that the former was getting a title in fee simple. The grantee was held to have an insurable interest in the property as its equitable owner.[20] And it was held in a case where the vendee had only in part performed that he had an insurable interest. The court said: "He was the owner by equitable title, and the destruction was his risk. Nobody was under obligation to rebuild for him, he could protect himself only by insurance."[21]

"The insurer on paying the loss is entitled to a transfer of the rights of the insured against the person by whose fault the fire or loss was caused."[22] The insured cannot maintain an action against the wrong-doer who has caused the loss, if it has been paid by the insurer. The theory is, that the action must be brought in the name of the real party in interest. If this were otherwise, the defendant would be liable to two actions.[23]

Where insurance contracts are written on the plan of a standard policy, which gives the insurer every means of diminishing the loss that the insured might have used, it entitles the insurance company to be subrogated to the insured's right of action against the vendee.[24]

The insured was a shipper over the defendant's railroad. The goods were destroyed through the carrier's negligence. The insurer paid the loss. The insurance company then brought an action against the defendant company for the destruction of the goods, on the theory that it was subrogated to the rights

lain v. Preston, *supra*; N. S. W. Bank v. N. Britt. & M. & Co., 2 New South Wales Law Report, p. 239.

[15] Ins. Co. v. Bailey, 13 Wallace, 616-618.

[16] Providence Co. Bank v. Benson, 24 Pick. 204-208.

[17] *Re* The Union Ins. Co., 23 Ontario Rep. 627. See the above court following Parcell v. Grosser, 109 Pa. St. 617.

[18] Lewis, Jr. v. New Eng. F. Ins. Co., 20 Fed. Rep. 496.

[19] Little v. Phoenix Ins. Co., 123 Mass. 380.

[20] Swift v. Vermont Mut. F. Ins. Co., 18 Vt. 305.

[21] Farmer's Mut. Fire Ins. Co. v. Fogleman, 25 Mich. 482.

[22] Civil Code of Lower Canada, § 2584.

[23] Allen v. C. & N. W. Ry. Co. (Wis.), 68 N. W. 873.

[24] Elliott Five Cent Saving Bank v. Commercial Union Assurance Company, 142 Mass. 142, 7 N. E. 550. Also see Mass. Statutes of 1881, Sec. 119, § 139, and Sec. 166 § 1.

of the insured. The court said: "Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity."[25]

"In such an action the assured may recover the full value of the property from the wrongdoer, but as to the amount paid him by the insurance company he becomes a trustee: and the defendant will not be permitted to plead a release of the cause of action from the assured."[26]

A vendor effected an insurance on a house with no intention of insuring his interest as to the purchase money, the most of which was paid. The insurance company's risk covered the full value of the house. The company defended on the ground that the lot on which the house stood would more than indemnify the vendor: 2nd, the company should be subrogated to the vendor's claim against the vendee. The court held that the insured was entitled to recover. The surplus, after his claim was paid, was to be held in trust for the vendee. The defendant has shown no equitable right to the vendor's claim.[27]

If the insured releases his claim for damages against the wrongdoer he releases the insurance company *pro tanto* by defeating their right to subrogation. As in the case where a tenant released his claim against his landlord, through whose negligence his goods were damaged.[28]

"And where the goods thus shipped have been insured by plaintiff, and upon the loss by fire the insurance company had paid the loss, the insurance company is entitled to be subrogated to the rights of the insured."[29]

The insured sued the tort feasor for the benefit of the insurers who had paid the loss. The damage to the property was caused by the negligence of a railroad company. The company defended on the ground that the insurers had been paid upon their policy. The court held that, "notwithstanding such payment, an action will lie by the insured against the railroad company. * * * Therefore payment by the insurance company before suit brought, cannot affect the right of action."[30] But where the insured receives benefit from the insurance company and then prosecutes a suit successfully against the wrongdoer, the insurance company is not entitled to subrogation if the amount of money received in both cases does not exceed the value of the property.[31]

"Where insured property is destroyed by fire negligently set out by a railroad company and the owner settles with the railroad company, and afterwards, without informing the insurance company of such fact, receives from the insurance company payment for the loss, the latter may recover from him the money so paid.[32]

The plaintiff, Hunt, as receiver of the People's Fire Insurance Company, brought an action against the New Hampshire Fire Underwriters Ass'n, to collect from them one-sixth of an original policy collected from the Granite State Insurance Company from whom the People's Fire Insurance Company had taken one-sixth of their risk and they in turn had reinsured to the defendant company. The People's Fire Insurance Company had become insolvent and a receiver had been appointed. Hunt wished to collect the amount insured by them in the New Hampshire Insurance Company since the property had been destroyed and take the same and hold it as assets of the insolvent company and pay the intervening company its part as one of its creditors. Held that the intervening company should have judgment as the insolvent company would have to pay direct over to the said Granite Insurance Company, thus stopping circuity of action.[33]

Judgment was rendered against the defend-

[25] Hall and Long v. Railway Co., 13 Wallace, 367.

[26] Norwich Union Fire Ins. Co. v. Staug, 18 Ohio Cir. Ct. 464-476, citing St. L., J. M. & S. Ry. Co. v. Commercial Ins. Co., 139 U. S. 223-235, and cases cited.

[27] Ins. Co. v. Updegraff, 21 Pa. St. 513-521.

[28] Atlantic Ins. Co. v. Storrow, 5 Paige, 285; Dilling v. Draenel, 16 Daly, 104, 9 N. Y. Supp. 497.

[29] Louisville & N. Ry. Co. v. Manchester Mills, 14 S. W. Rep. 314.

[30] Weber v. Morris and Essex Ry. Co., 35 N. J. L. 409-413.

[31] National F. Ins. Co. v. McLaren, 12 Ont. 682-688.

[32] Chickasaw Co. F. Mut. Fire Ins. Co. v. Weller, 68 N. W. Rep. 443.

[33] Hunt, Receiver, v. N. H. F. Underwriter's Ass'n, 68 N. H. 305.

ant. He was compelled to pay insurance money over to the insured, who at the time had an executory contract of sale for the premises. If the vendor, had brought a bill in a court of equity for specific performance the chancellor would have required him to do equity by making good the loss to the vendee. The court held that the insurers were liable to the extent of the policy. Also, that they could not defend on the ground that the insured would be indemnified on the payment of the purchase money.[34]

If at the time the property is destroyed, the insured can recover his loss from any source the insurance company seems to be entitled to that much credit. And if they have indemnified the insured, he holds anything that comes into his hands in diminution of that loss as trustee for insurers.[35]

If an insurance company insures a carrier against loss happening to goods transferred to their care for transportation, the insurance company has no right of action against the carrier after they, the insurance company, have paid the shipper, under the doctrine of subrogation.[36]

And where the mortgagee has collateral security for his debt, he also has an insurable interest in the mortgaged property. If the subject matter of the insurance is destroyed and he collects from the insurance, they are subrogated to his rights to the collateral security as an indemnification.[37]

"An insurance company cannot be subrogated in case of loss to the insured's right of action for damages against one who sold him the insured property through fraudulent representations of its value."

"Whoever owns property, whether by an absolute or qualified, legal or equitable title, or any interest in property, or has upon him the duty or in him the right to protect and preserve it, may insure it to the extent of his interest or liability."[38]

ROY ELIAS RESSLER,

Tipton, Ind.

[34] The F. & M. Ins. Co. v. Morrison, 11 Leigh (Va.), 354.

[35] Darrell v. Tibbits, L. R. 5 Q. B. D. 560; Castellain v. Preston, *supra*.

[36] Wager v. Providence Ins. Co., 150 U. S. 99-109.

[37] Ins. Co. v. Woodruff, 26 N. J. L. 541-550.

[38] Vol. 6, Universal Cyclopedia, 286-7; Franklin Ins. Co. v. Coates, 14 Md. 285; Protection Ins. Co. v. Hall, 15 B. Mon. (Ky.) 411; Ins. Co. v. Baring, 20 Wallace, 159.

INTOXICATING LIQUORS—RIGHT TO SELL.

STATE v. CITY OF NEW ORLEANS.

Supreme Court of Louisiana, April 11, 1904.

The business of selling intoxicating liquors is made lawful by the constitution and statutes of this state, and the right of any citizen to engage in it is one the enjoyment of which is subject to such conditions only as may be imposed or authorized by the general assembly in the legitimate exercise of the police power of the state.

An applicant for a barroom license, to whose character no objection is found, ought not to be refused permission to engage in that business, in a neighborhood where others are so engaged, on the objection of a minority of the property holders, or on the ground that no more barrooms are needed.

NICHOLLS, J., dissents.

STATEMENT OF THE CASE.

MONROE, J: The respondent has appealed from a judgment making peremptory a writ of mandamus commanding it to grant to the relator the right to open and carry on a barroom. Whether the judgment appealed from is correct or incorrect depends upon the interpretation which shall be placed upon certain provisions of state and municipal law, there being no dispute as to the facts.

The present charter of the city of New Orleans (Act Gen. Assem. No. 45, p. 53, of 1896), § 14, confers on the council the power, *inter alia*, to adopt and enforce such ordinances as may be necessary and proper "(1) to preserve the peace and good order of the city." Section 15, amended and re-enacted by Act No. 131, p. 228, of 1902: "(10) To regulate the police of theaters, public halls, dance houses, concert saloons, taverns, hotels, house of public entertainment, shops for retailing alcoholic liquors, houses of prostitution and assignation, and to close such houses from certain limits, and shall have power to exclude the same, and to close houses and places for the sale of intoxicating liquors when the public safety may require it, and to authorize the mayor and police to close such places; * * * (14) * * * to exercise general police power in the city of New Orleans." Section 21 of the act provides that "the council shall not grant any privilege for the opening of any barroom, saloon, concert saloon, or dance hall, except upon the consent of a majority of the *bona fide* householders or property holders within three hundred feet, measured along the street fronts, of the proposed location of such barroom, saloon, concert saloon, or dance hall, and that it shall revoke any privilege on the petition of a like number of such persons, any prior license or privilege to the contrary notwithstanding."

Acting under the authority thus conferred, the council adopted an ordinance (No. 12,636, C. S.) which reads:

"Be it ordained * * * that hereafter it shall not be lawful for any one to set up or establish any barroom, saloon, concert saloon, dance hall,

beer house, or place where liquors are sold at retail, by the glass, to be consumed then, without the permission of the council previously applied for in writing, which shall be accompanied by the written consent of a majority of the *bona fide* property holders, within three hundred feet, measured along the street front, of the proposed location of such barroom, saloon, concert saloon, dance hall, beer house, or place where liquors are sold at retail, by the glass," etc. The ordinance further provides that the petition of the applicant for either of the privileges enumerated shall be accompanied by a certificate from the city engineer showing that it has been signed by the requisite number of property holders, that violation of the ordinance shall be punishable by fine or imprisonment, and that such privileges shall be revocable at the pleasure of the council.

The council also adopted an ordinance (No. 13,481, C. S.) which reads: "Be it ordained * * * that, from and after the promulgation of this ordinance, no application for a barroom privilege shall be considered by the council unless accompanied by the treasurer's receipt, showing that he deposited with said treasurer the amount of the license due for barroom business at the date of the application."

Apart from the provisions of the respondent's charter which have been quoted, there were embodied in the revised statutes, when and before that charter was adopted, certain provisions in regard to the sale of intoxicating liquors, some of which were amended and re-enacted by Act No. 221, p. 451, of 1902, as follows:

"Section 1. Be it enacted that sections 1211 and 2778 of the revised statutes of 1870 be amended and re-enacted so as to read: 'That the police juries of the several parishes of the state, the municipal authorities of the several villages, towns and cities, and the city council of the city of New Orleans, shall have the exclusive power to make such rules and regulations for the sale, or the prohibition of the sale, of intoxicating liquors, as they may deem advisable, and to grant, or withhold, licenses for drinking houses and shops within the limits of a city, parish, ward of a parish, town, or village, as a majority of the legal voters of any city, parish, ward of a parish, town, or village may determine by ballot, and the said ballot shall be taken whenever deemed necessary by the police juries, of the several parishes, the municipal authorities of the several towns, and the city council of the city of New Orleans: provided, said election shall not be held oftener than once a year, and, when so held, the effect of said election shall continue in force until another election in the parish, ward of a parish, city, town, or village, is held on the same question; and provided further, that whenever, [at] an election held under this section, the majority of the votes cast in said ward, if only a ward election has been held, or a majority of the votes cast in the parish, if an election has been held for the whole parish, shall be against granting the licenses for the sale of intoxicating liquors, said vote or decision shall control the action of said ward, city, town, or village, within the limits of the said ward, or parish, as the case may be, as fully and completely as if said election had been held by authority of said city, town, or village.'

Sec. 2. That all laws in conflict with this act be, and the same are hereby repealed."

By another provision of the revised statutes (section 1212), the state relinquishes the right to grant licenses in any town, city or parish where they are not granted by the local authorities Beyond this the general law (Act No. 171, p. 387, of 1898), providing for the levying and collection of licenses applies, in terms, to barrooms, and requires that licenses shall be paid therefor as for any other business.

In his petition to the court, the relator alleges that, notwithstanding his compliance with the law, and notwithstanding the fact that its duty in the premises is purely ministerial, the council of the city of New Orleans refuses to grant him permission to open and conduct a barroom, and he prays for a writ of *mandamus*. To this the respondent answers that it carefully considered the relator's application, and, "in view of the protest of a respectable minority of the property holders, and of the fact that a similar application had been recently denied, and the further fact that a sufficient number of barrooms already existed in said vicinity, and for other good and substantial reasons rejected the same." It denies that the relator can engage in the business of selling liquor at retail without its permission, and emphatically denies that the consent of a majority of the property holders living within 300 feet of the proposed barroom entitles him, of right, to such permission; and it avers that the granting or withholding of the same is a matter entirely within its discretion, and with respect to which it cannot be controlled by *mandamus*. It also denies that the relator made the deposit with the treasurer as required by Ordinance 13,481. Upon the trial it was admitted, or proved without attempt at contradiction, that the relator presented a petition to the city council for permission to open and conduct a barroom at the corner of North Rampart and Iberville streets; that the petition so presented was accompanied by the written consent of 22 out of a total of 39 persons holding property within 300 feet of the proposed location, as certified by the city engineer; that 10 such persons thereafter protested against the granting of the permission; that the application was unfavorably acted on by the council, but that such action was not based upon any objection to the character of the applicant; and that there are several barrooms already established within 300 feet of the proposed location. The defendant offered to show by what considerations different members of the council and protesting property holders were influenced in refusing and opposing the granting of the permission desired by the relator, but some of the evi-

dence upon that subject, having been objected to as irrelevant, was excluded.

The main facts relied on by the respondent having been disclosed, however, no action is here invoked with respect to the ruling thus made. Those facts are substantially as follows: The clubhouse of the Young Men's Gymnastic Club is within half a square of the site selected for the proposed barroom. The Eye, Ear, Nose & Throat Hospital, a charitable institution, is diagonally opposite, on Rampart street. A number of gentlemen holding property on Rampart street have organized themselves into a commission for the purpose of improving the condition of the street, concerning which respondent's counsel says in his brief: "Rampart street, from the second block down to Esplanade avenue, is essentially a residence street, and, * * * whilst there are barrooms in the first block, and some scattering ones below, the buildings are occupied in a majority of instances as residences, and there is a constantly increasing tendency in that direction. Another barroom, on a block now free from saloons, would be likely to give a setback to the development of the avenue."

Per contra, it appears that relator proposes to establish his barroom at the northeast corner of Rampart and Iberville streets; that on Rampart street between Iberville and Canal—being that part to which respondent refers as the "first block," immediately south of or adjacent to said corner, there are already several barrooms, and that on Rampart street, to the north of the square in which relator proposes to establish his barroom, for some 8 or 10 squares, to Esplanade avenue, there are quite a number of barrooms, grocery stores, stables, undertaker's shop, soda-water factory, etc. The Young Men's Gymnastic Club, whose clubhouse is on the same square with the proposed site, has a barroom for the use of its members. It does not appear that the respondent or the property holders have attempted to close any barroom now open on Rampart street, which street, it may be said, is 100 feet wide, or more; and the hospital, on the opposite side, diagonally, cannot be much, if any, farther from the barrooms already established than from the site selected by the relator.

OPINION.

The constitution of this state contains these provisions pertinent to the matter at issue, to-wit:

"Art. 2. No person shall be deprived of life, liberty, or property except by due process of law." "Art. 181. The regulation of the sale of alcoholic and spirituous liquors is declared a police regulation, and the General Assembly may enact laws regulating their sale and use." Interpreting the word "liberty," as used in the connection in which it is found in article 2, the Court of Appeals of New York has well said: "'Liberty,' in its broad sense, as understood in this country, means the right not only to freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation." In the Matter of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 386, 2 N. E. Rep. 29, 52 Am. Rep. 34; *Ex Parte* Virginia, 100 U. S. 339, 25 L. Ed. 676.

Our organic law therefore secures to every citizen the right to earn his livelihood in any lawful calling, unless he is deprived of that right by due process of law, and it recognizes the business of selling intoxicating liquors as a lawful calling by conferring upon the general assembly the right to regulate rather than to prohibit it; and, conformably to the mandate thus conferred, the general assembly recognizes it as a lawful calling by including it among other callings, for the pursuit of which it authorizes the issuance of licenses, and by making no attempt to prohibit it, or to authorize its prohibition by any municipal corporation in the state. On the contrary, it has re-enacted, in part, since the adoption of the latest amendment to the charter of the City of New Orleans, a statute which, applying to the city in terms as specific as those of the charter, provides that "the city council of the city of New Orleans shall have the exclusive power to make such rules and regulations for the sale, or the prohibition of the sale, of intoxicating liquors as they may deem advisable, and to grant, or withhold, licenses from drinking houses and shops * * * as a majority of the legal voters may determine by ballot." Act No. 221, p. 451, of 1902, *supra*.

If we assume the different laws thus mentioned to be in all respects competent legislation, the question of prohibition *vel non*, in New Orleans, must be referred to the legal voters, to be decided by them at an election to be held for that purpose. In default of action by the legal voters prohibiting the liquor business, the question whether a particular individual shall engage in the business is to be decided by the city council in the event of, and after, favorable action by a majority of the persons holding property within 300 feet of the place where the business is to be conducted: unfavorable action by such property holders being conclusive. The power to regulate the business, if it be not prohibited by the voters, and to enforce the prohibition, if it be prohibited, is likewise vested in the council. The legal voters having taken no action, the selling of liquor in New Orleans is a legitimate business, recognized by the constitution and authorized by law, in which some thousands of persons are engaged, but in which the right of the relator to engage is denied by the city council, notwithstanding that he has done all that the law requires in the matter, and that no objection to his character is suggested.

It is wholly immaterial, for the purposes of the question presented, that it has been held that the right to sell intoxicating liquors is not inherent

in a citizen of a state or of the United States. Crowley v. Christenson, 137 U. S. 86, 11 Sup. Ct. Rep. 13, 34 L. Ed. 620, and equally immaterial that in another state it has been held that such right is derived from the common law. Welsh v. Indiana (Ind. Sup.), 25 N. E. Rep. 883, 9 L. R. A. 666, since in Louisiana it is a right conferred by the written law of the state, the enjoyment of which is subject to such conditions only as may be imposed or authorized by the general assembly in the legitimate exercise of the police power of the state.

The police power of the state can, however, be exercised only in the enactment and enforcement of laws, and the lawmaking power is restricted within the limitations imposed by the constitution of the United States and its own constitution, and those which are said to be inherent in American institutions, and, like other governmental authority, is to be used for the common welfare—impartially and without arbitrary or unjust discrimination to the prejudice of private rights and individual liberty. These propositions are interwoven among the principles upon which our system of our government is founded, and are supported by the following among other authorities, to-wit:

"It belongs to that department (the legislative)," says the Supreme Court of the United States in a leading case, "to exert what are known as the 'police powers' of the state, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public welfare. It does not at all follow that every statute enacted for those ends is to be accepted as a legitimate exercise of the police power of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. * * * The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter into an inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted for the protection of the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." Mugler v. Kansas City, 123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. Ed. 205.

In Giozza v. Tiernan, 148 U. S. 657, 13 Sup. Ct. Rep. 721, 37 L. Ed. 599, the Supreme Court of the United States sustained a statute of Texas requiring a bond of $5,000 to be given by all persons engaged in the business of selling intoxicating liquors by retail, and said: "This statute affects all persons in Texas engaged in the sale of liquors in exactly the same manner and degree. Whether considered as imposing restrictions upon the sale, in the exercise of the police power of the state, or as levying taxes upon occupations, under authority of the legislatures in that behalf, petitioner was not arbitrarily deprived of his property nor deprived of the equal protection of the laws."

In Eden v. People, 161 Ill. 296, 43 N. E. Rep. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365, the Supreme Court of Illinois held that "the police power does not justify a statute which makes it unlawful for barbers to do business on Sundays, without interfering with any other class of business," and, in so doing, said, "the fundamental principle upon which liberty is based is equality under the law of the land."

Assuming to be acting in the exercise of its police power, the council of New Orleans passed an ordinance prescribing the limits within which dairies might be conducted "by permission," and making it unlawful to keep more than two cows without such permission. This court held that the ordinance was illegal, because it did not affect all citizens engaged in the same business in the same way; because the discretion vested by the ordinance in the council was in no way regulated or controlled, and might be controlled by partisan considerations, race prejudice, or personal animosity, and exercised in the interest of a favored few. State v. Mahner *et al.*, 43 La. Ann. 496, 9 So. Rep. 480. It has likewise been held that a market ordinance adopted in the exercise of the police power "must be impartial, making no discriminations and creating no monopolies (State v. Sarradat *et al.*, 46 La. Ann. 700, 15 So. Rep. 87, 24 L. R. A. 584); that an ordinance prohibiting the stabling of more than two horses without permission of the council was unequal in its operation, repugnant to the fourteenth amendment of the constitution of the United States, and void (State v. Kuntz, 47 La. Ann. 106, 16 So. Rep. 651); that an ordinance, the effect of which was to permit four livery stables, already established, to be maintained in the business part of a town, whilst others were to be relegated to the suburbs, was neither "lawful," "fair," "general," "reasonable," "impartial," nor "consistent with public policy" (Town of Crowley v. West, 52 La. Ann. 526, 27 So. Rep. 53); that a similar ordinance concerning barrooms was void for similar reasons. Town of Mandeville v. Band, 111 La. 806, 35 So. Rep. 918.

In State v. Garibaldi, 44 La. Ann. 809, 11 So. Rep. 36, it was held that an ordinance prohibiting the establishment of private markets without permission previously obtained on the petition accompanied by the consent of a majority of the persons holding property within 600 feet of the site of any proposed market was void, in so far as it purported to delegate to private citizens the police power vested in the city council; and in Noel v. People, 187 Ill. 587, 58 N. E. Rep. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238, it was held that a statute vesting in a board of pharmacy the right to determine who should and who should not sell the usual domestic and proprie-

tary remedies, without in any way regulating the discretion vested in such board, was void.

It has also been held by the Supreme Court of Illinois that, "under a general ordinance of the city for licensing dramshops, the city authorities have no right to make an arbitrary discrimination in granting licenses. They cannot grant the same to a favored few, and refuse it to another who has in all respects complied with the ordinance and laws of the state, and who is admitted to be in every respect a suitable person. The business of dealing in liquor is recognized by the constitution as being a legitimate business, and a license to keep a grocery or dramshop is placed in the same category with any other lawful business, and must be dealt with according to law, and special privileges are not to be granted to particular persons. * * * Ordinances must be general in their character, and operate equally upon all persons within the municipality, of the same class, to whom they relate. They must not be in violation of any law, contrary to public policy, or unnecessarily oppressive, and must not unjustly and arbitrarily discriminate between citizens of the same class." Zanone v. Mound City, 103 Ill. 552.

The case at bar differs from some of those which have been cited, in that they concerned harmless callings, whilst that in which the relator proposes to engage is usually regarded as pernicious. That fact, no doubt, furnishes a sufficient reason for discriminating against the calling, but it affords no justification for discriminating between persons similarly situated who may be, or may desire to become, engaged in that calling. The relator occupies the same relation to any other barkeeper that the trade of the barber does to that of the baker, and the principle applied as between the two trades is equally applicable as between the two individuals engaged in the same business or trade. A statute of this state imposing conditions upon the business of selling intoxicating liquors, though such conditions be more onerous than those imposed upon another business, may be sustained because the business of selling intoxicating liquors more seriously affects the health, morals, and general welfare of the public than another business; but where, as in this case, the state legalizes the business of selling liquors, and an individual citizen is denied the right to engage in it in a place and under conditions where and under which others having no better qualifications than he are so engaged, the law, if any there be, authorizing such denial, has no just foundation in reason or in the police power of the state, for it deprives one citizen of the right to earn his livelihood by means of a lawful calling, whilst according that right to others similarly situated, and, in so doing, deprives him of the equal protection of the law, and of his liberty, without due process of law, and oversteps those restrictions upon legislation which are said to be inherent in the nature of American institutions.

The answer concedes, and the fact is, that the relator's application was considered and acted on by the council, and the defense that he failed to comply with the requirements of ordinance No. 13,481 is not insisted on. Our conclusion, then, is that the reasons assigned by the respondent are insufficient to support its refusal to grant to the relator permission to engage in the business of keeping a barroom at the place mentioned in the petition, and that the writ of mandamus was properly issued. The judgment appealed from is accordingly affirmed at the cost of the respondent.

NOTE.—*Constitutionality of Legislation Regulating the Sale of Intoxicating Liquors.*—What is and what is not a constitutional regulation of the sale of intoxicating liquors has often been a subject of controversy in the courts, and the decisions have not been uniform although the strong tendency of the courts is to uphold such legislation wherever possible, and have often stretched the constitution to its utmost limit in doing so.

Thus it has been held that the prohibition of the sale of intoxicating liquors between the hours of 11 P. M. and 5 A. M. is a valid subject for the exercise of legislative powers. Hedderich v. State, 101 Ind. 564, 1 N. E. Rep. 47, 51 Am. Rep. 768. So also an act requiring liquor sellers to conduct their business in a room where no other kind of business is carried on, and prohibiting music or devices for amusement from being permitted therein, imposes valid restrictions. State v. Gerhardt, 145 Ind. 439, 44 N. E. Rep. 469, 33 L. R. A. 313. So also the legislature has the right to confine the sale of intoxicating liquors for medical, scientific or mechanical purposes to druggists. Koester v. State, 36 Kan. 27, 12 Pac. Rep. 339. Again, an act empowering the mayor or other officers to enter the premises of a saloon to ascertain whether the law is violated or to preserve order is a proper regulation. Commonwealth v. Ducey, 126 Mass. 269. So also a law requiring the removal of shades or screens on doors or windows at times when the law required saloons to be closed does not violate the constitutional provision for securing the houses and possessions of every person from unreasonable searches and seizures. Robison v. Haug, 71 Mich. 38, 38 N. W. Rep. 668; State v. Doyle, 15 R. I. 325, 4 Atl. Rep. 764. So also the prohibition of the sale or giving away of any food or relish on premises where liquor is sold is not an unconstitutional regulation. People v. Worden, 39 N. Y. Supp. 582, 6 App. Div. 520. So, also, an ordinance making it an offense for a liquor seller to employ females to serve his customers is constitutional. Bergman v. Cleveland, 39 Ohio St. 651. So, also, a provision compelling a saloonkeeper to post a copy of his license is constitutional. *Ex parte* Bell, (Tex.), 6 S. W. Rep. 197.

Where, however, the legislature has evidently gone too far in the matter of regulation, the courts have been compelled to call a halt. Thus a law providing that no person without a state license "shall keep in his possession for another spirituous liquors" is void. State v. Gilman, 33 W. Va. 146, 10 S. E. Rep. 283, 6 L. R. A. 847. See also City of Columbus v. Schaerr, 5 Ohio S. & C. P. 100.

Taxation.—Although the legislature cannot lay a tax upon particular individuals, they may lay, or authorize a city to lay, a tax upon persons carrying on a particular vocation or traffic such as the sale of

liquor. Hodgson v. New Orleans, 21 La. Ann. 301; Appeal of Durach, 62 Pa. (12 P. F. Smith), 491; Haggart v. Stenlin, 29 N. E. Rep. 1073; State v. Bock, 9 Tex. 369.

Such a tax is not a tax upon "property" within the meaning of the constitution. Straub v. Gordon, 27 Ark. 625. A law providing for the arrest of a dramshop keeper refusing to pay his license is constitutional. Commonwealth v. Byrne, (Va.), 20 Grat. 165.

JETSAM AND FLOTSAM.

RIGHT OF TAXPAYER TO INSPECT BOOKS OF MUNICIPALITY.

An unusually important case on the right of a citizen and taxpayer to inspect the books of a municipal corporation is decided in State v. Williams, 110 Tenn. 549, 64 L. R. A. 418, 75 S. W. Rep. 948. It holds that a taxpayer has an absolute right to make such examination, but that the enforcement of that right by *mandamus* is within the discretion of the court, depending upon the showing of a proper case for the exercise of the right. The court declares that a citizen and taxpayer should be allowed to make a general examination of the books of the municipality when this is important to the public interests, but that this should not be lightly granted or permitted with unnecessary frequency, and that only a trustworthy and reliable person should be allowed to make it, subject at all times and at every stage to the supervision of the court. The fact that an ordinance requires a submission of the books to the inspection of certain officers or committees, and that the grand jury also has a right to an inspection, is held insufficient to defeat the right of a citizen and taxpayer. It is also held that the fact that the person seeking the inspection is politically hostile to their custodian does not deprive him of the right, unless it is sought with a corrupt purpose, merely to further his animosity. Neither is the fact that it will produce worry and inconvenience sufficient ground for denying the right. Many cases in England and the United States have dealt with this question. In some of them the right has been deemed to be an absolute one, but most of the decisions, while conceding that a taxpayer, by virtue of his interest, has such a right to inspect the records, nevertheless turn on the sufficiency of the purpose for which this is desired, and, as the court in the case above says: "In theory the right of examination is absolute, but in practice it is at last only a matter of discretion." Where the inspection was desired for private, rather than for public, purposes, it has been denied. When a citizen desires to make such examination for the purpose of obtaining information as to the proper administration of public affairs and correcting any abuse that may be discovered, some of the courts hold that he has sufficient reason for such inspection by judicial permission, subject, of course, to such regulations as will prevent any interruption or interference with the orderly course of business, or any mutilation or loss of the records or documents examined.

The question is, in some states, regulated by statutory provisions. While there is some considerable variety in the decisions respecting some of the instances in which the right is claimed, yet in general the authorities, as shown by a note to the above case, agree with the doctrine there laid down, that, while there is theoretically an absolute right to examine, its enforcement is to a considerable degree a matter of discretion; also that it must be exercised under reasonable regulations.—*Case and Comment.*

HUMOR OF THE LAW.

"It is embarrassing sometimes to pursue a direct line of questioning," said President Eliot, of Harvard, in telling about a recent visit to New York. He had just dined at a hotel in Fifth avenue, where the man who takes care of the hats at the dining-room door is celebrated for his memory about the ownership of headgear.

"How do you know that is my hat?" the collegian asked as his silk tile was presented to him.

"I don't know it, suh," said the doorman.

"Then why do you give it to me?" insisted President Eliot.

"Because you gave it to me, suh," replied the darkey.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL—Death of Defendant.—An action to recover real estate cannot be maintained after the death of defendant, without substitution of parties defendant.—Douglass v. Galend, Kan., 76 Pac. Rep. 395.

2. ACCIDENT INSURANCE—Beneficiary. — Accident insurance policy, containing warranty that assured was married, held forfeited, and beneficiary could not recover thereon after assured's death he having had no wife.—Gaines v. Fidelity & Casualty Co. of New York, 87 N. Y. Supp. 821.

3. ACCOUNT STATED—Meeting of Minds. — Where the proof in an action on an account stated failed to show a meeting of minds as to the balance alleged to be due, the complaint was properly dismissed.—Hall v. New York Brick & Paving Co., 88 N. Y. Supp. 582.

4. ADJOINING LANDOWNERS — Obstructing View.—The fact that a railroad piled ties on its right of way so as to obstruct the view from plaintiff's premises was not an infringement of any right of plaintiff for which he

could recover —Houston, E. & W. T. Ry. Co. v. Simpson, Tex., 81 S. W. Rep. 353.

5. ADVERSE POSSESSION — Burden of Proof.—Where defendant in an action of ejectment sets up title in himself by adverse possession, he assumes the burden of proving it.—Altschul v. Casey, Oreg., 76 Pac. Rep. 1083.

6. ADVERSE POSSESSION — Contructive Possession.—Actual possession by the grantee in a deed of a part of the land conveyed gives constructive possession to the extent of the boundaries of the deed.—Peden v. Crenshaw, Tex., 81 S. W. Rep. 369.

7. ADVERSE POSSESSION—Secret Entry.—One secretly entering on coal and mining it held not to acquire title by adverse possession.—Pierce v. Barney, Pa., 58 Atl. Rep. 152.

8. ALIENS— Exclusion of Anarchists. — Act March 3, 1903, for exclusion of alien anarchists, does not violate Const. U. S. art. 3, § 1, or amendments 5 and 6.—United States v. Williams, U. S. S. C., 24 Sup. Ct. Rep. 719.

9. ALTERATION OF INSTRUMENT — Indorsement.—An indorsee of a draft held authorized to write an abbreviation for the tern "cashier", after his name in the indorsement, to show the capacity in which he became a party to the paper. — Birmingham Trust & Sav. Co. v. Whitney, 88 N. Y Supp. 578.

10. APPEAL AND ERROR — Affirmance Procedure Below.—Where a judgment is affirmed with directions, the lower court must construe the same, and any error is subject to correction on review. — Cordele Ice Co. v. Sims, Ga., 48 S. E. Rep. 12.

11. APPEAL AND ERROR—Assignment of Error.—Complaint that the court did not submit an issue suggested by an improper requested charge held required to be specifically made by assignment of error.—Metcalfe v. Lowenstein, Tex., 81 S. W. Rep. 362.

12. APPEAL AND ERROR—Jury the Sole Judge of What.—The jury is the sole judge of the credibility of witnesses, the weight of evidence, and the damage shown.—Oregon Short Line R. Co. v. Russell, Utah, 76 Pac. Rep 345.

13. APPEAL AND ERROR—Law as to Docked Horses Within Police Power.—Laws 1899, p. 175, ch. 93, prohibiting the use of docked horses, held a reasonable exercise of police power.—Bland v. People Colo., 76 Pac. Rep. 359.

14. ASSAULT AND BATTERY—Measure of Damages.—In an action for assault, the measure of damages is such a sum as will compensate plaintiff for his physical injuries, pain, suffering, and loss of time, not exceeding the amount sued for.—Beavers v. Bowen, Ky., 80 S. W. Rep. 1165.

15. ASSIGNMENTS — Double Assignment of Wages.—Where one to whom wages are due makes two assignments, simultaneous in date and record, scienter on the part of the assignees does not affect the employer's right of defense.— Whitcomb v. City of Waterville, Me., 58 Atl. Rep. 68.

16. ASSIGNMENTS—Non-transferable Note.—A memorandum on a note that the same was nontransferable held ineffective to preclude its assignment or transferability as other nonnegotiable paper.—Herrick v. Edwards, Mo., 81 S. W. Rep. 466.

17. ATTACHMENT—Alteration of Certificate of Attachment.—Where it did not appear that an alteration correcting a certificate of attachment was made before it was filed, it was not error to hold the certificate invalid.—McDowell v. Parry, Oreg., 76 Pac. Rep. 1081.

18. ATTORNEY AND CLIENT—Authority to Compromise.—An attorney has no power, by virtue of his retainer, without express authority, to bind his client by a compromise of a pending suit, or any other matter intrusted to his care, although the client may live in a distant state.—Benedict v. Wilhoite, Ky., 80 S. W. Rep. 1155.

19. BANKRUPTCY—Bona Fide Transferee. — A grantee of property belonging to a bankrupt more than four months prior to the filing of the petition in bankruptcy held a *bona fide* purchaser for value, entitled to hold the conveyance as security for the bankrupt's debt.—Bratt v. Christie, 88 N. Y. Supp. 585.

20. BANKRUPTCY — Fraudulent Conveyances. — Sess. Laws 1889, § 67, is not a bankruptcy law, and was not suspended by the national bankruptcy law, so far as proceedings under it to set aside any alleged fraudulent conveyance made prior to July 1, 1898.—Grunsfeld Bros. v. Brownell, N. Mex., 76 Pac. Rep. 310.

21. BANKRUPTCY — Jurisdiction. — Summary revisory power of the Circuit Court of Appeals for the Eighth Circuit extends to questions of law arising in bankruptcy proceedings in a district court of Oklahoma, though jurisdiction on appeal is vested in territorial supreme court.—Plymouth Cordage Co. v. Smith, U. S. S. C., 24 Sup. Ct. Rep. 725.

22. BANKRUPTCY — Requisites of Plea Setting up Discharge —A plea of discharge in bankruptcy, not showing that the demand was not contracted after defendant's adjudication, was insufficient.—Fowler v. Michael, Tex., 81 S. W. Rep. 321.

23. BANKRUPTCY—Stock Assessment.—In a suit by a trustee in bankruptcy in a state court to recover an assessment on stock subscription under an order of United States District Court, the validity of the assessment is not open to a collateral attack.—Clevenger v. Moore, N. J., 58 Atl. Rep. 88.

24. BANKRUPTCY—Testimony of Bankrupt as Affecting Prosecution.—Exemption from prosecution for an offense under the bankrupt law, testified to by bankrupt before referee, held not given by Bankr. Act.—Burrell v. State of Montana, U. S. S. C., 24 Sup. Ct. Rep. 787.

25. BANKS AND BANKING—Failure to Promptly Return Draft.—A bank to which a draft had been sent for collection held liable to the drawer for any damages sustained by him, owing to its failure to promptly return the draft after its nonpayment —Lord v. Hingham Nat. Bank, Mass , 71 N. E. Rep. 312.

26. BANKS AND BANKING — Withholding Deposit.—Where plaintiff notified a bank of its claim to a deposit, as against the beneficiary, the bank was only bound to hold the deposit for a reasonable time to enable plaintiff to take legal steps to enforce its claim.—Drumm-Flato Commission Co. v. Gerlach Bank, Mo., 81 S. W. Rep 503.

27. BENEFIT SOCIETIES — Action on Certificate.—Fact that member of a beneficial association announced that he intended to drop his insurance held not to have affected his *status* as a member of the order.—Hyatt v. Loyal Protective Assn , Mo., 81 S. W. Rep. 470.

28. BENEFIT SOCIETIES — Contractual Relation with Members.—The relation between a member of a beneficial association and the association must be construed as a contractual one.—Logsdon v. Supreme Lodge of Fraternal Union of America, Wash., 76 Pac. Rep. 292.

29. BILLS AND NOTES—Indorser's Liability Inter Se.—In an action by the holder of a note against a second indorser, it was no defense that the action was brought against the second indorser alone, under an agreement between the holder and the first indorser. — Bank of America v. Wilson, Mass., 71 N. E. Rep. 312.

30. BILLS AND NOTES—Payment of Nonnegotiable Note Transferred Without Notice.—Payment by the makers of a nonnegotiable note before its maturity to the payee, without notice of its transfer, will discharge the makers.—Sykes v. Citizens' Nat. Bank, Kan., 76 Pac. Rep. 393.

31. BONDS — Stolen Coupons.—Bank to whom stolen coupons were pledged held to take a good title against the true owner.—Cochran v. Fox Chase Bank, Pa., 58 Atl. Rep. 117.

32. BROKERS — Revocation of Agency.—A contract of agency for the sale of land is revoked by the subsequent giving to another person of an option to purchase and notice of its exercise. — Faraday Coal & Coke Co. v. Owens, Ky., 80 S. W. Rep. 1171.

33. BROKERS—Sale by Broker's Agent to Himself.—A broker's agent having been authorized to sell 500 shares

for the broker's customer, and having sold them in 100-share lots, and bought one of them for himself, held, that the sale was void only as to such 100 shares.—Evans v. Wrenn, 88 N. Y. Supp. 617.

34. BURGLARY—Date of Commission.—On a trial for burglary and larceny, it is not essential to prove the commission of the offense on the particular day alleged.—State v. Bates, Mo., 81 S. W. Rep. 408.

35. CARRIERS—Cattle Improperly Transported.—A shipper of cattle held entitled to sell them at once after arrival at market, and sue for damages for improper transportation.—St. Louis Southwestern Ry. Co. v. Hunt, Tex., 81 S. W. Rep. 322.

36. CARRIERS—Change of Street Grade.—Act of legislature granting a franchise to a corporation to build a bridge held to have had the effect of establishing the grade of the street which the corporation might select as one of the termini of the bridge.—Mead v. City of Portland, Oreg., 76 Pac. Rep. 347.

37. CARRIERS—Claim Against for Injuries to Stock in Shipment.—Where a contract provides that a shipper shall make claim for injuries to stock shipped within a certain time, the burden of showing performance of such condition rests on the shipper.—Kalina & Cizek v. Union Pac. Ry. Co., Kan., 76 Pac. Rep. 438.

38. CARRIERS—Delay in Transporting Passenger.—In an action by a passenger for breach of a carrier's contract to transport her between certain points without unreasonable delay, a delay of 24 hours at a junction point held *prima facie* unreasonable.—International & G. N. R Co. v. Harder, Tex., 81 S. W. Rep. 356.

39. CARRIERS—Injury to Alighting Passenger.—In action for injuries to a passenger alighting on a dark night at what he thought was a station, evidence held to show negligence on the part of the carrier.—Englehaupt v. Erie R. Co., Pa., 58 Atl. Rep. 154.

40. CARRIERS—Joint Acts of Negligence.—Where a complaint for injuries to a passenger charged two acts of negligence jointly as the proximate cause of the injury, it was essential that both acts of negligence should be sufficiently charged.—Southern Ry. Co. v. Jones, Ind., 71 N. E. Rep. 275.

41. CARRIERS—Legislature's Attempt to Regulate Tolls. Surrender by a railroad of its special charter to accept a general railroad law before the state had attempted to regulate its tolls freed the company from liability to the state under a charter provison that the legislature could under certain circumstances regulate the tolls —Terre Haute & I. R. Co. v. State of Indiana, U. S. S. C., 24 Sup. Ct. Rep. 767.

42. CARRIERS—Licensed Hackmen.—One who solicits the services of a licensed hackman is a passenger, within an ordinance providing that it shall be unlawful for the driver to refuse to convey a passenger from any one point to any other point in the city.—Atlantic City v. Brown, N. J., 58 Atl. Rep. 110.

43. CHAMPERTY AND MAINTENANCE—Contract to Share in Fruits of Litigation.—Contracts whereby litigants share the fruits of a litigation with others in consideration of the aid given them are not against public policy and void.—Fenn v. McCarrell, Pa., 57 Atl. Rep. 1108.

4. CHARITIES—Cy Pres Doctrine.—Discontinuance of religious worship by a church, which was beneficiary of a trust, held to be a proper case for the application of the *cy pres* doctrine to the administration of the fund.—Osgood v. Rogers, Mass., 71 N. E. Rep. 306.

45. COMMERCE—Interference with Interstate Commerce.—Specification by municipal council in resolutions for street improvements that certain asphalt shall be the material used held not interference with interstate commerce, repugnant to the constitution.—Field v. Barber Asphalt Pav. Co., U. S. S. C., 24 Sup. Ct. Rep. 784.

46. CONSTITUTIONAL LAW—Abolition of Grade Crossing.—St. 1896, p. 268, ch. 321, in relation to abolition of grade crossings, held not unconstitutional as interfering in judicial proceedings.—Lancy v. City of Boston, Mass., 71 N. E. Rep. 302.

47. CONSTITUTIONAL LAW—Bigamy.—Where a divorce was granted before St. 1895, p. 476, ch. 427, relating to marriage was enacted, and the removal of the impediment by the expiration of two years occurred after its enactment, the statute so applied held not unconstitutional as being retrospective.—Commonwealth v. Josselyn, Mass., 71 N. E. Rep. 313.

48. CONSTITUTIONAL LAW—Condemnation Proceedings.—Whether the statute allowing plaintiff in condemnation proceedings to enter before decree is unconstitutional, and fixing the damages therefor at 10 per cent of the award, held immaterial, where the jury found no damages were suffered.—Marks v. Bradshaw Mountain R. Co., Ariz., 76 Pac. Rep. 470.

49. CONSTITUTIONAL LAW—Due Process of Law in Public Improvements.—Due process of law and equal protection held not denied nonresident owner of property liable to taxation for public improvement by provision of Rev. St. Mo. 1899, § 5989.—Field v. Barber Asphalt Pav. Co., U. S. S. C., 24 Sup. Ct. Rep. 784.

50. CONSTITUTIONAL LAW—Use of Docked Horses.—Laws 1899, p. 175, ch. 93, prohibiting the use of docked horses, held not in violation of Const. art. 2, § 3, relating to right to possess and protect property.—Bland v. People, Colo., 76 Pac. Rep. 359.

51. CONTRACTS—Municipal Corporations.—A contract with a private corporation by commissioners of a city, one of whom was a stockholder in the corporation, will be set aside on application of a taxpayer.—Brown v. Street Lighting Dist. No. 1 of Woodbridge Tp., N. J., 58 Atl. Rep. 115.

52. CORPORATIONS—Agreement with Promoters.—A corporation is not bound by an agreement between its promoters, unless the agreement has been ratified by the corporation.—Martin v. Remington-Martin Co., 88 N. Y. Supp. 573.

53. CORPORATIONS—Doing Business in Foreign State.—Where a foreign corporation has received permission to do business in the state, it cannot be enjoined from performing contracts made before such permission was obtained.—State v. American Book Co., Kan., 76 Pac. Rep. 411.

54. CORPORATIONS—Liability of Stockholders.—Where the rights of creditors are involved, the issue of stock by corporation as paid for by work and labor is upheld only where the contract for services was in good faith.—Clevenger v. Moore, N. J., 58 Atl. Rep. 88.

55. CORPORATIONS—Preferential Payments.—Directors of corporation held liable to account for preferential payments made to the value of property as appraised at the time of the payments.—Hill v. Standard Telephone Mfg. Co., Pa., 58 Atl. Rep. 147.

56. COUNTIES—Claim Against, a Charge on What Fund.—One suing the county on a claim cannot contend that the claim is not a charge on the general fund, and that it cannot be provided for by the board of county commissioners.—Gregg v. Board of Comrs. of Lake County, Colo., 76 Pac. Rep. 376.

57. COUNTIES—Destruction of Growing Crops.—In tort for unliquidated damages, interest on the damages assessed from the date of the commencement of the action up to the date of the verdict is not recoverable.—Lester v. Highland Boy Gold Min. Co., Utah, 76 Pac. Rep. 341.

58. COURTS—Contempt, Review by Court of Appeal.—Error lies from Circuit Court of Appeals to review order of circuit court adjudging defendant in suit for infringement of patent guilty of contempt.—*In re* Christensen Engineering Co., U. S. S. C., 24 Sup. Ct. Rep. 729.

59. COURTS—Suit Against a State.—No waiver by the state of its immunity from a suit in the federal court to set aside the title of the state to lands sold for taxes held shown by Pub. Acts Mich. 1899, p. 140, No. 97.—Chandler v. Dix, U. S. S. C., 24 Sup. Ct. Rep. 766.

60. CRIMINAL EVIDENCE—Assault with Intent to Commit Rape.—On a prosecution for assault with intent to commit rape, a motion to strike testimony as to a conversation with defendant shortly after the alleged crime was committed held properly denied.—People v. Scalamiero, Cal., 76 Pac. Rep. 1098.

61. CRIMINAL TRIAL—Absent Witnesses.—By admitting that an absent witness would, if present, testify as alleged in support of a motion for a continuance, a party does not admit that such testimony is true, but has the right to disprove it.—Nugent v. Armour Packing Co., Mo., 81 S. W. Rep. 506.

62. CRIMINAL TRIAL—Appeal in Habeas Corpus Proceedings.—Detention in county jail cannot on *habeas corpus*, be considered any part of time of imprisonment at hard labor in state's prison, to which prisoner was sentenced.—Dimmick v. Tompkins, U. S. S. C., 24 Sup. Ct. Rep. 780.

63. CRIMINAL TRIAL—Continuance.—The refusal of an application for a continuance cannot be reviewed on appeal, where no bill of exceptions is reserved to the ruling of the court on the application.—McClarney v. State, Tex., 80 S. W. Rep. 1142.

64. CRIMINAL TRIAL—Cross-Examination.—On appeal in a criminal case, the conduct of the trial court in refusing to permit defendant's counsel to confer with him during his cross-examination held not error.—Pettis v. State, Tex., 81 S. W. Rep. 312.

65. CRIMINAL TRIAL—Declarations of Companion as Res Gestæ.—Declarations of companion of defendant in a prosecution for homicide held admissible as part of the *res gestæ*.—McMahon v. State, Tex., 81 S. W. Rep. 296.

66. CRIMINAL TRIAL—Illegal Sale of Liquor.—The court, on trial of an indictment for selling malt liquors, is not bound to define the term "malt liquor."—State v. O'Connell, Me., 58 Atl. Rep. 59.

67. CRIMINAL TRIAL—Objections to Grand Jurors.—Objection to qualification of grand jurors may be taken by plea in abatement after return of indictment, but prior to arraignment.—Crowley v. United States, U. S. S. C., 24 Sup. Ct. Rep. 731.

68. CRIMINAL TRIAL—Right to be Heard by Counsel.—The constitutional guaranty that one accused of crime shall have a right to be heard by counsel is not infringed by the denial of a continuance in a criminal case, moved for on the ground of the absence of employed counsel.—Usher v. State, Tex., 81 S. W. Rep. 309.

69. CRIMINAL TRIAL—Statement of Penalty by Court.—On a criminal trial, the statement by the court of the penalty prescribed by statute for the crime charged is not error.—People v. Canepi, 87 N. Y. Supp. 773.

70. DAMAGES—Building Contract, Defective Work.—In an action on a building contract, the jury may deduct from the amount claimed for injuries caused by defective work.—Shultz v. Seibel, Pa., 57 Atl. Rep. 1120.

71. DAMAGES—Remote Negligence an Element in Mitigation.—Where plaintiff's negligence was the remote cause of his injury, the jury is required as a matter of law to consider such negligence in mitigation of damages.—Memphis St. Ry. Co. v. Haynes, Tenn., 81 S. W. Rep. 374.

72. DAMAGES—Trespass of Sheep.—In an action for damages for the trespass of sheep, the measure of damages was the reasonable value of the grass eaten, together with any injury to the freehold,—Pacific Live Stock Co. v. Murray, Oreg., 76 Pac. Rep. 1079.

73. DEEDS — Designation of Grantee.—The phrase "bodily heirs," in a deed conveying land to a man and wife and the bodily heirs of the wife, meant her children.—Yokley v. Superior Drill Co., Ky., 80 S. W. Rep. 1513.

74. DIVORCE—Custody of Child.—Filing of stay bond on appeal from modification of an order awarding custody of child in divorce proceedings held not to entitle appellant to the custody of the child pending appeal.—*In re* De Lemos, Cal., 76 Pac. Rep. 1115.

75. DIVORCE—Custody of Children.—Under Civ. Code, § 192, relative to custody of child of divorced parents, the court on its own motion should inquire into facts and make necessary order, which it may afterwards vacate in a proper case.—Pearce v. Pearce, Mont., 76 Pac. Rep. 289.

76. EASEMENT — Constructive Possession. — Compromise of an action relating to a portion of the alley, which defendant claimed under a deed, held not to affect defendant's constructive possession of another portion of the alley.—Peden v. Crenshaw, Tex., 81 S. W. Rep. 369.

77. ELECTIONS — Failure of Board to Furnish Tally List.—Failure of a board of elections to forward to the board of supervisors the tally list and list attached thereto held not to preclude consideration of the ballots casts at the election on a contest thereof.—Davis v. Grunig, Cal., 76 Pac. Rep. 1102.

78. EMINENT DOMAIN—Cost of Removing Buildings.—The cost of removal of buildings from land condemned for railroad right of way forms no part of the damages to be assessed to the owners.—White v. Cincinnati, R. & M. R. R., Ind., 71 N. E. Rep. 276.

79. EMINENT DOMAIN—Nature of Telegraph Company's Right of Way.—A telegraph company acquires only an easement in the right of way of a railroad condemned to construct a telegraph line thereon.—Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co., Ga., 48 S. E. Rep. 15.

80. EMINENT DOMAIN—Permissive Use of Streets.—Grantee from municipal corporation of right to use a public street for public purposes held to acquire a property right by the expenditure of money in reliance on the grant.—Meade v. City of Portland, Oreg., 76 Pac. Rep. 347.

81. EMINENT DOMAIN—Private Corporations.—Where a private corporation proposes to take private property for its corporate purposes, whether the contemplated use is of a public character is a question of law.—Rockingham County Light & Power Co. v. Hobbs, N. H., 58 Atl. Rep. 46.

82. EMINENT DOMAIN—Telegraph Company.—Peculiar advantages accruing to a telegraph company from its use of the railroad right of way cannot be considered in the assessment of damages in condemnation proceedings.—Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co., Ga., 48 S. E. Rep. 15.

83. EVIDENCE — Lex Loci Contractus.—Where a written contract is made in one state, to be performed in another, and it does not specify what law is to govern, parol evidence is admissible to show that it was intended that the law of the state where it was made should govern.—Davis v. Tandy, Mo., 81 S. W. Rep. 457.

84. EXECUTION — Delay in Having Sale Set Aside.—A sale on execution cannot be set aside, on motion of defendant, two years after confirmation, showing no reason for such delay.—Hill v. Gatliff, Kan., 76 Pac. Rep. 428.

85. EXECUTION—Security Deed.—A security deed conveys absolute title, and leaves the grantor no interest in the land which can be subjected to levy.—Shumate v. McLendon, Ga., 48 S. E. Rep. 10.

86. EXECUTORS AND ADMINISTRATORS—Assignment by Legatee.—Assignees of a legatee held entitled to priority of payment from a fund over the claims of the executors for money paid on account of the legatee after notice of the assignment.—Stewart v. Fallon, N. J., 58 Atl. Rep. 98.

87. EXECUTORS AND ADMINISTRATORS — Payment of Mortgage Debt After Mortgagor's Death.—One paying without authority, after the death of the mortgagor, the balance of the mortgage debt, cannot recover the sum so paid from the mortgagor's estate.—Falls v. Jones, Mo., 81 S. W. Rep. 455.

88. FIRE INSURANCE—Selection of Arbitrators.—Arbitrators of loss by fire should not endeavor to secure the selection of dishonest incompetent persons as umpires, or insist on parties living at a distance from the

scene of the loss.—Fowble v. Phoenix Ins. Co., Mo., 81 S. W. Rep. 485.

89. FORGERY — Instructions. — Where defendant was found guilty of forging a note, failure of the court to instruct with reference to passing a forged instrument was immaterial.—Usher v. State, Tex., 81 S. W. Rep. 309.

90. FRANCHISES—Presupposes a Benefit to the Public. —The grant of a franchise presupposes a benefit to the public, and an equal right on every member thereof within the territory involved to participate in the benefit on the same terms and conditions.—Rhinehart v. Redfield, 87 N. Y. Supp. 789.

91. FRAUD—Certificate of Deposit Imparting Notice.— A certificate of deposit held to impart notice to assignees that there were claims against the fund which it represented prior to the rights of the assignors.—Looney v. Bartlett, Mo., 81 S. W. Rep. 481.

92. FRAUDS, STATUTE OF — Abandonment of Mining Claim.—Statute of frauds (Mills' Ann. St. § 2019) has no application to abandonment of mining claim by locator and permission to another to locate claim thereon.—Conn v. Oberto, Colo., 76 Pac. Rep. 369.

93. FRAUDS, STATUTE OF—Contract for Water Supply. —A contract for a water supply is a contract for the sale of goods, wares, and merchandise, within the statute of frauds.—Jersey City v. Town of Harrison, N. J., 58 Atl. Rep. 100.

94. FRAUDULENT CONVEYANCES—Natural Gas Controlled by State.—The production and distribution of natural gas is a business of a public nature, the control of which belongs to the state.—City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co., Kan., 76 Pac. Rep. 448.

95. GRAND JURY — Effect of Statutory Disqualification. —Statutory disqualification of grand jurors held not a mere defect in form, within Rev. St. U. S. § 1025 (U. S. Comp. St. 1901, p. 720).—Crowley v. United States, U. S. S. C., 24 Sup. Ct. Rep. 731.

96. HOMESTEAD — Husband and Wife.—Where a husband and wife joined in the sale of their homestead, which was community property, the contract was enforceable as against the husband on the termination of the homestead either by abandonment or death of the wife.—Ley v. Hahn, Tex., 81 S. W. Rep. 354.

97. HOMICIDE—Principals.—Where two persons are jointly indicted for murder, one as principal in the first degree and one in the second degree, each may be convicted on evidence that he was either the absolute perpetrator or was aiding and abetting.—Morgan v. State, Ga., 48 S. E. Rep. 9.

98. HOMICIDE — Third Person Wrongfully Participating in Altercation.—Where one is killed in self-defense by another, a third person, though wrongfully participating in the altercation, in league with the one that did the killing, cannot be convicted of the homicide.—McMahon v. State, Tex., 81 S. W. Rep. 296.

99. HUSBAND AND WIFE — Community Property.— Whether a deceased wife owned debts or not did not affect her administrator's right, as against her husband, to community property.—Bollinger v. Wright, Cal., 76 Pac. Rep. 1108.

100. HUSBAND AND WIFE—Estoppel.—A wife, having signed a deed of trust without reading it, relying on the false representations of her husband, held estopped as against the beneficiary from denying its validity.—Hyatt v. Zion, Va., 48 S. E. Rep. 1.

101. INDICTMENT AND INFORMATION—Failure to Verify Information.—Where the failure to verify an information as required by statute was not taken advantage of by motion to quash, the failure is not open to review.—State v. Speyer, Mo., 81 S. W. Rep. 480.

102. INFANTS—Contract for Putting in Crop on Shares. —Minor held not entitled to maintain trover for the conversion of a crop which the minor had planted under contract with defendant for a share thereof, but rescinded the contract before the crop was grown.—Skinner v. Young, Mo., 81 S. W. Rep. 464.

103. INJUNCTION—Appealable Orders.—An order striking out all that portion of a preliminary injunction order mandatory in character, and dissolving the injunction to that extent, is appealable.—Wolf v. Board of Sup'rs of Santa Clara County, Cal., 76 Pac. Rep. 1108.

104. INJUNCTION—Ordinance Reducing Street Railway Rates.—Equity will entertain jurisdiction of a suit to restrain enforcement of municipal ordinance reducing street railway rates on a section only of consolidated line, as impairing obligation of contracts.—City of Cleveland v. Cleveland City Ry. Co., U. S. S. C., 24 Sup. Ct. Rep. 756.

105. INTEREST—Judgments.—The rate of interest on judgments rendered after the adoption of the Revised Statutes of 1901 is 6 per cent. per annum.—Howard v. Perrin, Ariz., 76 Pac. Rep. 460.

106. JUDGMENT—Mistake in Law.—A mistaken view of legal rights, which leads a party to pray for improper relief, does not affect the bar of the judgment, estopping the party to again litigate the same facts.—Lockhart v. Leeds, N. Mex., 76 Pac. Rep. 312.

107. JUDGMENT — Partition as Affecting Homestead Rights.—Judgment in partition held not to estop a widow from afterwards asserting homestead rights in a portion of the land.—Penn v. Case, Tex., 81 S. W. Rep. 349.

108. JUDGMENT—Petition to Set Aside on Ground of Perjury.—A petition in a suit in equity to set aside a judgment at law on the ground of perjury of the successful party held defective for failing to show that the defeated party exercised diligence to meet the false evidence.—Wabash R. Co. v. Mirrielees, Mo., 81 S. W. Rep. 437.

109. JUDGMENT—Presumption Where Relief Granted Exceeds Petition.—It will be presumed, in aid of a judgment granting more than the petition prayed for, that an amendment to the petition praying for the relief granted was filed.—Campbell v. Upson, Tex., 81 S. W. Rep. 358.

110. JURY—Qualification. — At common law one convicted of a felony is disqualified from serving as a juror. —Commonwealth v. Wong Chung, Mass., 71 N. E. Rep. 292.

111. LANDLORD AND TENANT—Damages Where Continuing.—Where, in an action for damages, the damages are continuing, such only as have accrued at the time the suit is brought can be recovered.—Albey v. Weingart, N. J., 58 Atl. Rep. 87.

112. LANDLORD AND TENANT—Liability to One Tenant for Negligence of Another—A landlord is not liable for for the negligence of another tenant in permitting water to accumulate and overflow and damage the former's goods.—Sheridan v. Forsee, Mo., 81 S. W. Rep. 494.

113. LANDLORD AND TENANT—Payment of Debt. — In an action to recover a debt, held that the acceptance of a note of a third person was a payment of the debt sued on.—Elm City Lumber Co. v. Mackenzie, Conn., 58 Atl. Rep. 10.

114. LANDLORD AND TENANT — Renewal of Lease.— Where a lease provided for a renewal of 10 years, the rent to be fixed by arbitrators, and the arbitrators failed to agree, equity has power to fix the amount of the rent for the extended term.—Caufman v. Liggett, Pa., 58 Atl. Rep. 129.

115. LARCENY — What Proof Sustains Indictment. — Proof of the larceny of property from the agent of the owner sustains an indictment charging a larceny from the owner.—Lowry v. State, Tenn., 81 S. W. Rep. 373.

116. LIBEL AND SLANDER—Accusation of Scandal Monger Libelous *per se*.—An accusation of being a secret slanderer and scandal monger, guilty of betraying one's friends and telling lodge secrets, is libelous *per se*.—Patton v. Cruce, Ark., 81 S. W. Rep. 380.

117. LIBEL AND SLANDER—Comments on Privileged Matters.—Striking headlines, prefixed to a newspaper report of judicial proceedings, holding prosecuting witness up to the public as traitor and perjurer, held not

privileged, even if the report itself was privileged, under Act 277 of the Philippine Commission, § 7, as fair report of judicial proceedings.—Dorr v. United States, U. S. S. C., 24 Sup. Ct. Rep. 808.

118. LIBEL AND SLANDER—Publication. — Where defendant mailed libelous letters to plaintiff, having reason to belive that they would be opened by an authorized person other than plaintiff, it was a publication.—Rumney v. Worthley, Mass., 71 N. E. Rep. 816.

119. LICENSES—Gas and Oil Leases.—Gas and oil leases are in the nature of licenses, with a conditional grant, conveying the grantor's interest in the well, conditioned that the oil is found in paying quantities.—Dickey v. Coffeyville Vitrified Brick & Tile Co., Kan., 76 Pac. Rep. 398.

120. LIFE INSURANCE — Insurable Interest. — One to whom insured assigns his life policy, not being a relative of his and not alleging any insurable interest in his life or in the policy, held not entitled to recover on it.—Dugger v. Mutual Life Ins. Co. of New York, Tex., 81 S. W. Rep. 335.

121. LIMITATION OF ACTIONS — Amendment of Pleadings.—The statute of amendments does not cause an amendment to a pleading to relate back to the commencement of a suit, so as to defeat the bar of the statute of limitations against the cause stated in the amendment —Nelson v. First Nat. Bank, Ala., 38 So. Rep. 707.

122. LOTTERIES—Distribution by Chance.—Prizes for closest estimates of number of cigars on which tax will be paid in a certain month held not a distribution by chance, within Pen. Code, § 323, defining lotteries.—People v. Lavin, 87 N. Y. Supp. 776.

123. MASTER AND SERVANT—Assumed Risk.—A servant injured by a revolving set screw, held to have assumed the risk, though there was evidence that such screws had been supplanted by a safer device.—Archibald v. Cygolf Shoe Co., Mass., 71 N. E. Rep. 315.

124. MASTER AND SERVANT—Contributory Negligence. —To hold an employee guilty of contributory negligence, it must appear that he was sufficiently acquainted with the work to appreciate its dangers, and he has the right to presume, where the danger is not obvious, that the work is reasonably safe and that he will be notified of special dangers.—Lebeau v. Dyerville Mfg. Co., R. I., 57 Atl. Rep. 1592.

125. MASTER AND SERVANT — Defective Appliances.— Where an appliance furnished by a master was suitable at the time plaintiff entered his employ, he did not assume the risk of injury from such appliance becoming defective.—Studenroth v. Hammond Packing Co., Mo., 81 S. W. Rep. 487.

126. MASTER AND SERVANT — Duty to Establish Rules for Protection of Servants —It is the duty of the master, when the nature of the business requires it, to make and promulgate rules for the protection of his servants, and to use due care and diligence after making and promulgating of a necessary rule to have it enforced.—Johnson v. Union Pac. Coal Co., Utah, 76 Pac. Rep. 1089.

127. MASTER AND SERVANT — Liability of Independent Contractor.—One for whom an excavation in a street was being made by a contractor held liable for injuries sustained by one falling into it. — Cameron Mill & Elevator Co. v. Anderson, Tex., 81 S. W. Rep. 282.

128. MASTER AND SERVANT—Malicious Procurement of Servant's Discharge.—A passenger on a street railway car incurs no liability to a conductor by reporting to the superintendent such conductor's misconduct toward a passenger.—Lancaster v. Hamburger, Ohio, 71 N. E. Rep. 289.

129. MASTER AND SERVANT—Personal Injuries.—Drop hammer used for crushing iron held a machine, within the meaning of Burns' Ann. St. 1901, § 7087, relating to the duty of employers.—Green v. American Car & Foundry Co., Ind., 71 N. E. Rep. 268.

130. MECHANIC'S LIEN—Action to Enforce.—In an action to enforce a mechanic's lien against the owner and an alleged original contractor, plaintiff could not recover, in the absence of evidence of a contract between the owner and such contractor.—Jose v. Hoyt, Mo., 81 S. W. Rep. 468.

131. MONEY RECEIVED—Pleadings.—Where the plaintiff in an action for money had and received, which *ex æquo et bono* belonged to plaintiff, failed to show that defendant had actually received such money, he cannot recover —Nelson v. First Nat. Bank, Ala., 36 So. Rep. 707.

132. MONOPOLIES—Validity of Contract.—Contract for payment of percentages on freight held not in violation of Rev. St. U. S. 1890, prohibiting contracts in restraint of trade.—Ceballos v. Munson S. S. Line, 87 N. Y. Supp. 811.

133. MORTGAGES — Appeal, Cross Errors.—In the absence of an assignment of cross-errors, the supreme court cannot consider whether a judgment, so far as it is against appellee, is erroneous in whole or in part.—Haigh v. Carroll, Ill., 71 N. E. Rep. 317.

134. MORTGAGES—Rights of Owner of Equity of Redemption.—The owner of the equity of redemption after a foreclosure sale for the full amount of the debt held entitled to possession during the period of redemption.—Haigh v. Carroll, Ill., 71 N. E. Rep. 317.

135. MORTGAGES—Sale in Parcels.—A court will not set aside a sale under a decree foreclosing a mortgage on the ground that sale was in parcels, while the decree directed the sale in one parcel.—Summerville v. March, Cal., 76 Pac. Rep. 188.

136. MORTGAGES — Security Deed.—Where land has been conveyed by security deed, in order to redeem, there must be a payment of the security debt.—Shumate v. McLendon, Ga., 48 S. E. Rep. 10.

137. MUNICIPAL CORPORATIONS — Control of Public Property.—On a bill by a taxpayer to enjoin city council from granting the use of a public common to individuals for a baseball park, a question as to whether such use would be unreasonable is one of fact.—Sherburne v. City of Portsmouth, N. H., 58 Atl. Rep. 38.

138. MUNICIPAL CORPORATIONS — Defective Streets.— Defect in a portion of a street not open to travel, which caused injury to person approaching the sidewalk from her house, held not one for which the city was liable.—Lynch v. City of Boston, Mass., 71 N. E. Rep. 301.

139. MUNICIPAL CORPORATIONS — Failure to Remove Snow from Sidewalks.—A city is not negligent for failure to remove snow from sidewalk immediately after snowfall.—Foley v. City of New York, 88 N. Y. Supp. 690.

140. MUNICIPAL CORPORATIONS — Fixing Street Car Fares.—Requisite written acceptances of municipal ordinances for consolidation of street railway lines, which secured to the public for a limited time, while the privileges continued, benefit of the five cent fare, held to create a contract right to charge that rate, which could not be reduced by municipality.—City of Cleveland v. Cleveland City Ry. Co., U. S. S. C., 24 Sup. Ct. Rep. 756.

141. MUNICIPAL CORPORATIONS—Maltreatment in Contagious Hospital.—Where plaintiff's decedent died from maltreatment in a city contagious hospital, plaintiff's remedy was by indictment of the hospital officers and by civil action against them as individuals.—City of Lexington v. Batson's Admr., Ky., 81 S. W. Rep. 264.

142. MUNICIPAL CORPORATIONS—Power of Legislature to Validate Ultra Vires Contract.—It is in the power of the legislature by an act to validate contracts made by cities in excess of their powers.—City of Leavenworth v. Leavenworth City & Ft. L. Water Co., Kan., 76 Pac. Rep. 451.

143. MUNICIPAL CORPORATIONS—Removal of Fire Department Employee.—The failure of a member of a fire department of a city to comply with a rule which has been disregarded for over 30 years held not cause for his removal —People v. Sturgis, 88 N. Y. Supp. 631.

144. MUNICIPAL CORPORATIONS—Smoke Ordinance as Applied to Engines.—A city ordinance, forbidding per-

mitting any cinders, gas or smoke to be discharged from engines, held unreasonable and void as to a railroad company.—Jersey City v. Abercrombie, N. J., 58 Atl. Rep. 73

145. MUNICIPAL CORPORATIONS—Tax Bills —Tax bills for public improvements will not be set aside after performance, because of acts of agents in securing contract, where no fraud is shown.—Field v. Barber Asphalt Pav. Co., U. S. S. C , 24 Sup. Ct. Rep. 784.

146. NAMES—Misspelling.—The fact that the heirs of a man named "Clark" wrote their names "Clarke" to a deed to property inherited from him is not an irregularity that will defeat the conveyance.—Altschul v. Casey, Oreg., 76 Pac. Rep. 1083.

147. NEGLIGENCE—Boy's Responsibility a Question for Jury.—The measure of a boy's responsibility for contributory negligence, where there is any doubt as to the facts, or the inferences to be drawn from them, is for the jury.—Dynes v. Bromley, Pa., 57 Atl. Rep. 1123.

148. NEGLIGENCE—Defective Wall —A boy going into an alley on private land, leading from a street to a public saloon, held entitled to the same degree of protection against danger from a dangerous adjacent wall as he would have been on a highway.—Haack v. Brooklyn Labor Lyceum Assn., 87 N. Y. Supp. 814.

149. NEGLIGENCE—Insufficient Railing.—In an action against the lessee of a building for personal injuries by the giving way of a railing erected around an area, evidence held to require submission to the jury of the issue of defendant's negligence —Devine v. National Wall Paper Co., 88 N. Y. Supp. 704.

150. NEW TRIAL—Ejectment.—Where in an action in partition, the sole litigated question is as to plaintiff's title, the action is in ejectment, and the defeated party is entitled to a second trial.—McNulty v Exchange Bank of Stockton, Kan., 76 Pac. Rep. 395.

151. OFFICERS -- Torts. — A petition charging that a county bridge commissioner negligently performed his duties, whereby plaintiff was injured by the breaking of a bridge, held not to state a cause of action against the commissioner.—Schooler v. Arrington, Mo., 81 S. W. Rep. 468.

152 PARTNERSHIP—Suit for Accounting.—Administratrix of a deceased partner held not entitled to maintain a suit for accounting against one only of the other members of the firm, without showing that the joining of the other partners as parties was unnecessary.—Lynch v. Foley, Colo., 76 Pac. Rep. 370.

153. PARTNERSHIP—Surcharging Partner.—Estate of deceased partner held not to be surcharged because of error in estimating value of firm assets.—Knipe v. Livingston, Pa., 57 Atl. Rep. 1130.

154. PERPETUITIES—What Constitutes.—Where testator devised property to his sons, to be divided when they became of age, and in case either son did not survive, his share to go to the survivors, it did not create a perpetuity.—Coleman v. Coleman, Kan., 76 Pac. Rep. 439.

155. PERJURY—Necessary Averments.—An information for perjury should affirmatively allege, or state from other averments, that the false testimony was material. —Brown v. State, Fla , 36 So. Rep. 705.

156. POSTOFFICE—Lottery Schemes.—Financial co-operative scheme, certain to involve a loss to every one interested, held a lottery, within the meaning of the provisions of Rev. St. U. S., empowering postmaster general to deny privileges of the mails in certain prohibited enterprises —Public Clearing House v. Coyne, U. S. S. C., 24 Sup. Ct Rep. 789.

157. PRINCIPAL AND AGENT — Misrepresentation by Husband —A husband, in inducing his wife to sign a deed of trust to a bank to secure his debt, held not the agent of the bank, so as to charge it with his false representations, made to induce her to sign the same.—Hyatt v. Zion, Va., 48 S. E. Rep. 1.

158. PRINCIPAL AND AGENT—Sale to Principal.—Where an agent sold his own property to his principal, concealing the ownership, principal's remedy was by rescission. —Whitehead v. Lynn, Colo., 76 Pac. Rep. 1119.

159. PRINCIPAL AND SURETY—Surety's Right to Sue for Reimbursement.—Where a surety under legal compulsion pays a judgment against his principal, he may sue him for reimbursement.—Reed v. Humphrey, Kan., 76 Pac. Rep. 390.

160 PUBLIC LANDS—Railway Land Grants. — The United States cannot retain, as against its grantees of land within indemnity limits of the grant made by Act June 8, 1856, ch. 41, 11 Stat. 17, in aid of railroads, a sum collected from trespassers for removal of iron and stone between the selection of such lands and the approval of the selection.—United States v. Anderson, U. S. S. C., 24 Sup. Ct. Rep. 716.

161. QUIETING TITLE—Breach of Contract.—Failure to pay royalties under contract allowing the manufacture and sale of a certain patented article, held not to constitute a cloud on title, justifying the interposition of a court of equity.—Henderson v. Dougherty, 88 N. Y. Supp. 665.

162. QUIETING TITLE — Costs as Against Disclaiming Defendant.—A defendant in a suit to quiet title, filing a disclaimer, cannot recover costs against plaintiff in a sum exceeding the amount necessary to enable the filing of the disclaimer.—Summerville v. March, Cal., 76 Pac. Rep. 388.

163. REFERENCE—Referee's Allowance for Services.—Allowance of $2,550 to a referee for services for 30 days reduced to $1,000.—Jordon v. Western Union Tel. Co., Kan., 76 Pac. Rep. 396.

164. SALES—Counterclaim Due to Breach of Warranty. —Where the purchaser of goods has accepted them, in an action for the purchase price, wherein he claims a breach of warranty, he is entitled only to a counterclaim for such damages as resulted from the breach.—Lenz v. Blake-McFall Co., Oreg., 76 Pac. Rep. 356.

165. SALES — Remedies on Breach of Warranty. — Where, in an executed sale of a chattel, there is a breach of warranty, the purchaser may return the article, or sue for the breach of warranty, or use it as a defense.—Harrigan v. Advance Thresher Co., Ky., 81 S. W. Rep. 261.

166. SPECIFIC PERFORMANCE — Oral Agreement to Convey Land. — An oral agreement to convey lands will not be enforced in equity, unless the failure to enforce it will work a fraud on plaintiff.—Jayne v. Brown, 88 N. Y. Supp. 589.

167. SPECIFIC PERFORMANCE—When Contract is Not Ambiguous.—Equity will specifically enforce a contract to devise property in a particular manner in consideration of services performed, where the proof leaves no reasonable doubt as to the terms and character of the agreement.—Asbury v. Hicklin, Mo., 81 S. W. Rep. 890.

168. STREET RAILROADS — Duty of Motorman on Discovering Peril of Pedestrian. — Though a person struck by a street car was negligent, yet if the motorman observed such negligence in time to have prevented collision, and failed to do so by the exercise of ordinary care, defendant was liable. — Memphis St. Ry. Co. v. Haynes, Tenn., 81 S. W. Rep. 374.

169. STREET RAILROADS — Willful Breaking of Car Window.—The willful breaking of a window of a street car is not a violation of any of the provisions of Gen. St. 1901, § 2098.—State v Cain, Kan., 76 Pac. Rep. 443.

170. TAXATION—Action to Recover for Taxes Paid.—In a proceeding to recover the taxes paid, the assessment and tax rolls, which contain the original extension of the levies made by the taxing officer, are competent evidence.—Douglass v. Byers, Kan., 76 Pac. Rep. 432.

171. TAXATION—Property of Married Woman.—A regulation charging a husband primarily with the duty of paying taxes on his wife's real estate held reasonable.—Union School Dist. of Guilford v. Bishop, Conn., 58 Atl. Rep. 13.

172. TAXATION—Sale of Entire Tract.—Where a part of a tract of land was taken for a railroad purpose, a part for a highway, and a part remained in the owner, a sale of the whole tract for a single tax on the whole is illegal.—Lancy v. City of Boston, Mass., 71 N. E. Rep. 302.

173. TENANCY IN COMMON—Account Rendered.—On account rendered between tenants in common, charge by court of interest from time when settlement should have been made held not prejudicial to defendants.—Sieger v. Sieger, Pa., 58 Atl. Rep. 140.

174. TERRITORIES—Criminal Law.—Right of government to appeal from acquittal in court of first instance in Philippine Islands, recognized by military order No. 58, as amended by Act of Philippine Commission Aug. 10, 1901, held taken away by Act Cong. July 1, 1902, ch. 1369, § 5, 32 Stat. 692, notwithstanding recognition in section 9 (32 St. 695) of that act of established jurisdiction of insular courts.—Kepner v. United States, U. S. S. C., 24 Sup. Ct. Rep. 797.

175. TERRITORIES—Right of Trial by Jury.—Right of trial by jury was not extended by federal constitution without legislation to the Philippine Islands.—Dorr v. United States, U. S. S. C., 24 Sup. Ct. Rep. 808.

176. TRESPASS—When Title is not Involved.—In trespass *quare clausum*, the title to real estate is not involved, and it is sufficient if plaintiff shows he was in actual possession.—Davis v. Alexander, Me., 58 Atl. Rep. 55.

177. TRIAL—Instructions.—Where the trial court has fully charged the law on one aspect of the case, it is not bound to reiterate it in another form.—Buckley v. Westchester Lighting Co., 87 N. Y. Supp. 763.

178. TRIAL—Proof of Signatures.—Where mortgagor signed by mark, attested by a witness, error in admitting it in evidence without testimony that attesting witnesses had signed their names held not reached by objection that witnesses were not called.—Ballow v. Collins, Ala., 36 So. Rep 712.

179. TRIAL—Requests to Charge.—Requests to charge, made before the commencement of the summing up, must be charged or refused.—Franklin v. Frichofer Vienna Baking Co., N. J., 58 Atl. Rep. 82.

180. TRIAL—Special Questions.—Where a jury answers a special interrogatory, "We do not know," they answer in the negative as to one on whom the burden falls.—Kalina & Cizek v. Union Pac. R Co., Kan., 76 Pac. Rep. 433.

181. TRUSTS—Construction of Trust Deed.—A deed of trust of a life estate construed, and held not to entitle the trustee to oppose a proceeding for a partition freed from the life estate, with the consent of the life tenant.—Brillhart v. Mish, Md., 58 Atl. Rep. 28.

182. TRUSTS—Power of Sale.—Deed conveying land to husband, in trust for his wife for life, with remainder to their children, held to authorize the trustee to convey the fee.—St. Louis Land & Building Ass'n v. Fueller, Mo., 81 S. W. Rep. 414.

183. UNITED STATES—Appeal from District Court of Porto Rico.—United States is not suable, under Tucker Act March 3, 1887, ch. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], on a claim for the value of the use by the army of Spanish merchant vessel captured during the war with Spain.—J. Ribas y Hijo v. United States, U. S. S. C., 24 Sup. Ct. Rep. 727.

184. UNITED STATES—Effect of Inability to Make United States a Party.—Inability to make United States a party defeats right of patentee for improvement in stamp canceling machines to enjoin use by post-master of infringing machine of which the United States is lessee in possession.—International Postal Supply Co. v. Bruce, U. S. S. C., 24 Sup. Ct. Rep. 820.

186. USURY—Law of Which State Governs.—Where a note is given in one state, payable in another, as concerns the question of existence of usury, the law of the latter state governs, in the absence of a contrary stipulation, expressed or presumed.—Davis v. Tandy, Mo., 81 S. W. Rep. 457.

186. USURY—Payment Under Duress.—Provision in a note that it may be paid before maturity, on payment of principal, interest to date, and $1.000 in addition, is not usurious.—Kilpatrick v. Germania Life Ins. Co., 88 N. Y. Supp. 628.

187. VENDOR AND PURCHASER—Building Restriction.—Building restriction in chain of the title held to prevent owner from carrying out agreement to convey lot free from all restrictions.—Coues v. Hallahan, Pa., 58 Atl. Rep. 158.

188. VENDOR AND PURCHASER—Specific Performance.—A person who purchases and with knowledge that the vendor has previously entered into an enforceable contract for the sale thereof, and who takes subject to such contract, may enforce its specific performance.—Randolph v. Wheeler, Mo., 81 S. W. Rep. 419.

189. WATER AND WATER COURSES—City Taking Water Plant After Expiration of Franchise.—The owner of waterworks erected under an ordinance granting a franchise for 20 years may enjoin the city from taking the plant in an unlawful manner after expiration of such period.—City of Leavenworth v. Leavenworth City & Ft. L. Water Co., Kan., 76 Pac. Rep. 451.

190. WATER AND WATER COURSES—Damnum Absque Injuria.—Digging and unreasonble use of a well by owner of land thereon and thereby depriving owner of adjacent land of use of well on his land held not an actionable wrong.—Houston & T. Cent. Ry. Co. v. East, Tex., 81 S. W. Rep. 279.

191. WILLS—Construction as to Devised Property.—Executors held, under provisions of will, not entitled to hold certain property devised to testator's niece, and liable to account for rents when they did so hold it.—Rooney v. Bodkin, 87 N. Y. Supp. 800.

192. WILLS—Construction of Devise.—Where testator devised certain property to his sons, not to be sold until the youngest came of age, and if either of them died "without heirs or legal representatives of his own," the survivor to take the property, the remainder over to the survivors is not repugnant to the estate previously granted.—Coleman v. Coleman, Kan., 76 Pac. Rep. 439.

193. WILLS—Devise to Churches.—Churches, as beneficiaries of a devise of real property in trust for the support of religious worship, held to be tenants in common and not joint tenants.—Osgood v. Rogers, Mass., 71 N. E. Rep. 306.

194. WILLS—Trustee's Discretion in Allowing Beneficiary Income.—Testamentary trustee given discretion as to amount of income to be paid beneficiary held not to have burden of proof to show propriety of same on objections to his account.—*In re* Bailey's Estate, Pa., 57 Atl. Rep. 1095.

195. WITNESSES—Credibility Where Portion of Testimony is False.—Giving of false testimony as to a material fact does not justify the jury in disregarding the entire testimony, unless the false testimony was willfully given.—Lee v. State, Ark., 81 S. W. Rep. 385.

196. WITNESSES—Husband and Wife.—Revision 1900 (P. L. 1900, p. 363, § 5), concerning evidence, in no wise limits the competency of either to testify in an action for divorce for adultery for or against the other.—Schaab v. Schaab, N. J., 57 Atl. Rep. 1000.

197. WITNESSES—Husband and Wife in Action to Quiet Title.—Husband held competent witness in action against wife's administrator to quiet title to land notwithstanding Code Civ. Proc. § 1880, subd. 3.—Bollinger v. Wright, Cal., 76 Pac. Rep. 1108.

198. WORK AND LABOR—Services in Exploring Lands.—In an action by a person engaged in mining and buying and selling mineral lands, for the value of his services in exploiting mineral lands to aid in their sale, held error to submit the question of value to the jury in the absence of evidence thereon.—Sayers v. Crane, Mo., 81 S. W. Rep. 473.